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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2001

KATHLEEN KEARNEY, et al.,

Petitioners,

v.

DOES 1-13, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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2094

QUESTION PRESENTED

In a would-be class action, the district court entered judgment in 1996 for the plaintiffs without entering a class certification order. Five years after entry of that final judgment, during an appeal of a contempt order, the court of appeals determined that an "implied" class existed and instructed the district court how to define it. The question presented is:

> Does Fed.R.Civ.P. 23, which requires class certification before a decision on the merits, permit the court to certify a class five years after entry of the final judgment in the absence of a formal prejudgment certification order?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Petitioner-defendants: Kathleen Kearney, secretary of the Florida Department of Children and Families; Charles Auslander, District 11 administrator, Florida Department of Children and Families; Carl Littlefield, assistant secretary, Florida Department of Children and Families; and. Robert Sharpe, Medicaid Director, Florida Agency for Health Care Administration.

Respondent-plaintiffs: the respondents appeared anonymously below. The petitioners have filed their names under seal.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioners, executive branch officials of the State of Florida, respectfully petition the Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 261 F.3d 1037, and is reproduced at petitioners' appendix A. The district court's final judgment is reproduced at petitioners' appendix B. Its order on contempt, which was the subject of the appeal, is

reproduced at petitioners' appendix C. The second order appealed, a post-judgment class certification order, is reproduced at petitioners' appendix D.

JURISDICTION

The court of appeals rendered its decision on August 14, 2001. Pet. App. A. This Court has jurisdiction under 28 U.S.C. s. 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed.R.Civ.P. 23 states in relevant part:

> (c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
>
> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
>
> ✦✦✦
>
> (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

STATEMENT OF THE CASE

This is a would-be class action originally brought in March 1992 by 13 anonymous Medicaid-eligible individuals with developmental disabilities. The lawsuit was an attack on waiting lists for placement in intermediate care facilities for the developmentally disabled (ICF/DDs). ICF/DDs are residential treatment facilities that provide 24-hour care and services to severely disabled individuals with developmental disabilities. Pet. App. A p. 3 n. 1. ICF/DDs are funded through the joint federal-state Medicaid program. *Id.* The respondents contended that they were not being provided ICF/DD services with "reasonable promptness," as required by 42 U.S.C. s. 1396a(a)(8) and the Fourteenth Amendment to the Constitution. *Doe v. Chiles*, 136 F.3d 709, 711 (11th Cir. 1998) (*Does I*).

The petitioners are officials of the Department of Children and Families and the Agency for Health Care Administration, the two state agencies charged with administering ICF/DDs and Medicaid.

Class Certification Activity through *Does I*

In July 1992, the respondents moved for class certification. They sought certification of a class under Fed.R.Civ.P. 23(b)(2). The petitioners resisted the motion, and after a hearing, a magistrate judge recommended certification in a report and recommendation issued August 26, 1996. The magistrate judge did not specify the type of class for which he recommended approval.

On August 28, 1996, two days after publication of the report and recommendation, the district court, although knowing about the existence of the report and recommendation, entered a final judgment in the case without ruling on the motion for class certification. The final judgment was a terse, one-page document that said in relevant part:

> ORDERED AND ADJUDGED that Defendants shall, within 60 days of the date of this Order, establish within

> the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities. Jurisdiction is retained to enforce this order. Any pending motions are dismissed as moot.

Pet. App. B p. 49-50.

The record indicates that the district court *deliberately* did not enter a formal certification order. In January 1997, the petitioners moved to stay the effect of the final judgment pending appeal. Among other things, the petitioners protested the class-wide nature of the relief. They argued that such relief was inappropriate because no class had been certified, no class- or system-wide injury had been shown, and no actual injury to the named respondents had been demonstrated.

The district court dismissed these arguments, saying that class certification was not necessary:

> The finding, that this case is the type [which is] "capable of repetition yet evading review,' eliminated the need for a further finding of actual harm to the named plaintiffs *or a determination that this case should be certified as a class action.*

Emphasis added.

The petitioners appealed the final judgment, raising the lack of class certification, a point the court of appeals did not expressly address in its decision affirming the district court. *Does I* at 712, 722.

Post *Does I* Contempt Proceedings

On remand, the respondents filed several motions seeking contempt sanctions. At first, the district court denied them. However, in August 1998, the district court opted to treat the respondents' latest motion for contempt as a motion to show cause. The court held a hearing on November 4, 1998, on the motion. The court then found the petitioners had failed to comply with the final judgment. The district court refrained from finding the petitioners in contempt. Instead, the court

ordered them to take several remedial steps, including the filing of a plan "which identifies, locates and provides for the immediate delivery of services to the 600 persons the state has recognized as eligible for but not receiving services for the developmentally disabled.". Pet. Ap. 53. The petitioners filed their plan on January 11, 1999. Pet. App. A p. 5.

In May 1999, the court held a three-day hearing to determine whether the petitioners had complied with the judgment and to inquire into the details of the January plan. *Id.*

In October 1999, the court found the petitioners had failed to comply with the final judgment and held them in contempt. App. C. In passing, the district court recognized that it had failed to certify a class in the case. Pet. App. C. p. 56 n. 2. It sanctioned the petitioners $10,000/day until they complied with the judgment. Pet. App. C p. 65.

The petitioners appealed this order, in part arguing that the district court could not base a contempt finding on any purported failures to serve a "class" in the absence of a formal class certification order. Pet. App. A p. 16.

During the pendency of the contempt appeal, on February 11, 2000, sua sponte and without notice to the parties, the district court entered a belated class certification order. Pet. App. A p. 6. The district court was motivated by the petitioners' appeal of the contempt order, where they raised lack of class certification as a defense. *Id.* The petitioners appealed this belated order and the court of appeals consolidated both appeals.

Does II — The Decision of the Court of Appeals

On August 14, 2001, the court of appeals vacated the contempt order primarily on the ground that the alleged violations of the judgment were matters not within the scope of the final judgment. Pet. App. A. The court of appeals also vacated the belated class certification order on the ground that the district court lacked jurisdiction to enter it. *Id.* at 48.

However, the court of appeals held that an "implied" class existed. That is, the court of appeals ordered certification of a class despite the fact the district court never entered a formal prejudgment certification order as required by Fed.R.Civ.P. 23(c) and despite the fact that five years had now passed since entry of the final judgment. Pet. App. A pp. 16-22. The court of appeals also directed how that class should be defined:

> Medicaid eligible individuals with developmental disabilities who have requested, and have been determined eligible for, placement in an Intermediate Care Facility ("ICF/DD") but who have not received a placement with reasonable promptness.

Pet. App. A p. 22. "To keep the paper current, the district court should enter an order to that effect upon remand," the court of appeals said. *Id.* at 22.

Thus, while the petitioners won on all the contempt issues and obtained the vacation of the belated class certification order, they lost on the question whether a class would be "implied," or certified, post-judgment.[1]

REASONS FOR GRANTING THE PETITION

This case presents the question whether the plain text of Rule 23(c), which requires prejudgment class certification, and this Court's precedent permit *post*-judgment certification. The courts of appeals have split on this issue.

Much rides on the resolution of the question. As this Court has observed, postjudgment resolution of class certification motions is at odds with the rule's text, and allows litigants to

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[1] Because the court of appeals "implied" a class, the respondents have declared themselves prevailing parties in *Does II*, and have sought appellate attorneys' fees and costs under 42 U.S.C. s. 1988.

"game" the system: a party can obtain a ruling on a claim advanced on behalf of a class without having to satisfy Rule 23's rigorous requirements.[2] For instance, having seen which way the wind blows, individuals may opt out of the class if the result isn't to their liking.

Courts may approve certifications after judgment without making the findings of commonality, typicality, numerosity and adequacy of representation required by the rule. And they may do so in circumstances that preclude meaningful appellate review.

The failure to define a class before judgment in a would-be class action can make judgments perilously vague and defective — to the extent that they may be unenforceable. The failure to certify a class before judgment and to define the class in the judgment often leaves the parties guessing who benefits from relief imposed and the defendants bewildered over the scope of their obligations. Litigation over such vague judgments only increases the cost of litigation and the waste of the parties' and the courts' time and resources.

This Court must bring order to this confusion.

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Apparently feeling constrained by old precedent from the former Fifth Circuit, the court of appeals found that this case was a class action despite the lack of a class certification order entered before judgment on the merits and despite ample precedent from this court indicating that Fed.R.Civ.P. 23(c) does not allow "implied" class actions. Pet. App. A pp. 16-22.

Four decisions from this Court collectively stand for the proposition that a class cannot be certified after judgment on the

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[2] *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-178 (1974).

merits. Hence, one cannot "imply" the existence of a class, as the court of appeals did, in the absence of a prejudgment certification order.

The first case is *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). In *Eisen*, the issues were whether a class numbering perhaps 2.5 million people who could be identified with reasonable effort had to receive individual, rather than published, notice and who would pay for that notice. The district court decided that the defendants should pay, despite the general requirement in Rule 23 that the plaintiffs bear the cost of notice. The district court reached this decision after conducting a preliminary review of the merits and determining that the plaintiffs were likely to succeed with their lawsuit. Because the plaintiffs were likely to succeed, the district court decided it was fair to impose 90 percent of the cost of notice on the defendants. This Court, however, disagreed with the district court's approach, saying class certification determinations must precede any decision on the merits. The Court said that ruling on the merits before class certification "contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements of it. He [the plaintiff] is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action . . . .'" *Id.* at 177-178.

The second case is *Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975). The *Jacobs* plaintiffs sought to enjoin enforcement of school regulations affecting the operation of their student newspaper, claiming violations of their constitutional rights. At oral argument, this Court learned that all the plaintiffs had graduated from school. There never was any formal class certification order entered in the case, nor was any effort made to identify

the class as contemplated by Rule 23(c)(1) or (3). The district court orally decided to certify a class (*id.* at 851) and mentioned class certification briefly in an "entry on motion for permanent injunction" (*Id.* at 850), but never entered a formal certification order. Because no class was properly certified, this Court held that the action was moot.

The third case is *Baxter v. Palmigiano*, 425 U.S. 308 (1976). The question of class certification arose in the Court's discussion of jurisdiction. *Id.* at 310 n. 1. The Court observed that while the district court had "treated the suit as a class action . . . [it] did not certify the action as a class action . . . Without such certification and identification of the class, the action is not properly a class action." *Id.*

The fourth case is *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). *Spangler* was a school desegregation case brought by children and their parents. The case had never been certified as a class action, although it had been filed as a would-be class action and "all the parties have until now treated it as a class action." *Id.* at 430. During the life of the case, the children grew up and graduated. This Court thus faced a mootness challenge. *Id.* This Court held that the absence of pre-judgment class certification deprived the children and parents of standing to continue litigating the action. Only the timely intervention of the United States prevented dismissal of the case as a whole. *Id. Cf. Board of Education of North Little Roc, Arkansas School District v. Davis*, 454 U.S. 904, 906 (1981) (Rehnquist J., dissenting to a denial of a petition for writ of certiorari) (questioning whether the federal courts had jurisdiction of this school desegregation case because there was "no remaining plaintiff with a stake in the outcome of the case, nor had there been any previous certification of a class action.").

These decisions are consistent with the plain text of Rule 23(c)(1) and (3), which require that class certification must take place, if at all, at or before final judgment on the merits. This Court has said that "actual, not presumed, conformance with

Rule 23(a) remains, however, indispensable." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). The same policy considerations behind *Falcon* and Rule 23(a) should apply to the timing of certification orders under Rule 23(c).

The decision below is inconsistent with these decisions because it allows post-judgment class certification by appellate fiat rather than by the measured application of the standards set out in Rule 23(b) and compliance with the text of Rule 23(c). And it permits plaintiffs to obtain a decision on the merits without having to satisfy the requirements of Rule 23.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

Despite *Eisen*, this Court's other precedent and Rule 23(c)'s unambiguous text, the circuit courts have taken divergent views on the question whether a class may be certified after judgment.

Some courts have held unequivocally that post-judgment class certification is impermissible. See *Peritz v. Liberty Loan Corp.*, 523 F.2d 349 (7th Cir. 1975); *Roberts v. American Airlines Inc.*, 526 F.2d 757 (7th Cir. 1975); and *International Union v. Donovan*, 746 F.2d 839 (D.C. Cir. 1984); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974). *Cf. Garrett v. City of Hamtramck*, 503 F.2d 1236, 1243-1246 (6th Cir. 1974) (court cannot alter or expand a class definition after the decision on the merits). The *Peritz* court was particularly strong in rejecting post-judgment certification, relying on *Eisen* and the plain text of Rule 23(c). *Id.*, 523 F.2d at 353-354.

Other courts have disapproved post-judgment certification. See *Rodriguez v. Banco Central*, 790 F.2d 172, 174-175 (1st Cir. 1986); *Nance v. Union Carbide*, 540 F.2d 718, 723 n. 9 (4th Cir. 1976) ("The language of Rule 23(c) makes it quite clear that the determination of class status is to be made 'before the decision on the merits.'").

However, some courts permit class certification after judgment even though Rule 23(c)'s plain language appears to prohibit it. See *Bing v. Roadway Express Inc.*, 485 F.2d 441 (5th Cir. 1973); *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir. 1977); *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979).

Uncritically following old Fifth Circuit precedent and making little effort to distinguish contrary cases from other circuits, the Eleventh Circuit joined the camp permitting post-judgment class certification without formal satisfaction of Rule 23's requirements. Pet. App. A pp. 18-23.

The issue in this case is of constitutional magnitude. Rule 23 is imbued with Article III case-or-controversy concerns. See *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (Rule 23 requirements must be interpreted in keeping with Article III constraints). Because the circuits have taken opposing views on what amounts to the Article III jurisdiction of federal courts to impose class relief, this Court should grant the petition to resolve this long-simmering conflict

III. THE ISSUE IS ONE OF NATIONAL IMPORTANCE.

This Court's review is essential to maintain the integrity and the uniform application of the Federal Rules of Civil Procedure. See *e.g., Schiavone v. Fortune*, 477 U.S. 21 (1986) (certiorari grant to review conflicting interpretations of the rules by the circuits).

Unless the Court steps in, the problems created by post-judgment class certification, which strike at the heart of the courts' Article III jurisdiction and the integrity of Rule 23, will recur — perhaps with greater frequency than they have in the past. The class action has become the preferred vehicle for seeking relief in a wide range of lawsuits, from institutional reform (of prisons, foster care, the delivery of services to

individuals with disabilities) to shareholder derivative and mass tort actions. Between 1996 and 2000, the number of class actions filed in the federal courts doubled — from 1,223 in 1996 to 2,419 in 2000. Pet. App. E p. 68. During the same period, total civil filings remained relatively constant, ranging from 257,000 to 273,000 cases. *Id.* Delays in class certification are a frequent problem,[3] and it is not uncommon for district courts to grant judgment without certifying the class. As the number of class action filings increase, the likelihood of post-judgment certifications increases.

Post-judgment certification and especially certification implied post-judgment by an appellate court present several significant problems.

First, as this Court observed in *Eisen*, post-merits class certification allows a plaintiff to obtain the benefits of a class action without having to satisfy Rule 23's rigorous requirements. *Eisen*, 417 U.S. at 177-178.

Second, post-judgment certification may allow district and appellate courts to certify classes without making the necessary findings of compliance with Rule 23's components: commonality, typicality of claims or defenses, numerosity and adequacy of the representative. Thus, a court may enter a post-judgment certification order even though class certification may be unwarranted. See *e.g., Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001) (class certification orders vacated because of lack of demonstrated typicality of claims by alleged representative plaintiffs).

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[3] See *Premier Electric Construction Co. v. National Electric Contractors Association Inc.*, 814 F.2d 358, 363 (7th Cir. 1987) ("Delay in certifying the class is regrettably frequent, even though appellate courts continually condemn the practice.").

Third, post-judgment certification may occur in circumstances that deny the parties of the ability to obtain meaningful appellate review of the certification decision. This is particularly true when an appellate court "implies" certification after judgment.

Fourth, the failure to require strict compliance with Rule 23(c) complicates litigation and drives up its cost. The failure to certify a class before judgment usually is accompanied by a failure to define the class in the judgment, as required by Rule 23(c)(3). The rule effectively entwines the class definition with, and in fact makes it a part of, the relief imposed. Would-be class action judgments which fail to comply with Rule 23(c)(3) thus may become inherently vague. The parties and the courts often have no firm idea who is entitled to benefit from the relief granted or to whom the defendants may owe obligations. Such vagueness provokes rather than ends litigation as the parties battle over clashing views of the meaning of the judgment and to whom it applies. This case is a prime example of how a vague judgment only stimulates further litigation, wasting the time and resources of the parties, the courts and the public.

Finally, the need for uniform rules governing the conduct of class action litigation is no less pressing than the need for uniform rules governing the tabulation of votes. See *e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000). Congress, in fact, has recognized the need for uniform rules of judicial procedure. The rules enabling act, 28 U.S.C. s. 2072(a), empowers this Court to adopt general rules applicable to Article III courts. The act's purpose is to ensure uniformity nationwide. See *Henderson v. U.S.*, 517 U.S. 654, 672 (1996) (Rule 4 provides a nationally uniform procedure for service of process); *Hanna v. Plummer*, 380 U.S. 460, 472 (1965). However, because of the divergent positions taken by the courts of appeals, that uniformity does not, and will not, exist in class action cases until this Court addresses the question presented in this case.

CONCLUSION

For these reasons, the Court should grant the petition.

RESPECTFULLY SUBMITTED,

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PETITIONERS' APPENDIX

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APPENDIX A
OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 99-14590 &
00-12097

D.C. Docket No. 92-00589-CV-WDF

JOHN/JANE DOE, 1-13 by and through Mr./Mrs. Doe Sr. No.'s 1-13 as natural guardians on and behalf of those similarly situated,

Plaintiffs-Appellees,

versus

JEB BUSH, in his official capacity as Governor of the State of Florida, KATHLEEN KEARNEY, in her official capacity as Secretary of the Department of Children and Family Services, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(August 14, 2001)

Before ANDERSON, Chief Judge, CARNES, Circuit Judge, and NANGLE*, District Judge.

CARNES, Circuit Judge:

State officials charged with the administration of the Medicaid program in Florida appeal two separate orders arising out of the same litigation. The first appeal is from a contempt order entered on October 7, 1999, for their alleged failure to comply with the injunctive relief ordered in a 1996 final judgment involving the state's Medicaid program. The second appeal is from a class certification order entered on February 11, 2000, approximately three months after the defendants filed their notice of appeal from the contempt order and nearly four years after the entry of final judgment in the case. We consolidated the two appeals.

This litigation has been ill-fated since the district court entered its terse final judgment in 1996. The scope and reach of that judgment has been a source of contention between the parties leading to this point. There are a number of issues, all of which we will discuss in the course of this opinion. For the present introductory purposes, suffice it to say that we have concluded that the district court's finding of contempt, as well as its belated entry of the class certification order, are due to be reversed, and the case remanded to the district court which will then have an opportunity to more clearly define the obligations it intends to impose upon the defendants.

I. PROCEDURAL BACKGROUND

In 1992, thirteen unnamed developmentally disabled individuals ("plaintiffs") who had been placed on waiting lists

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*Honorable John F. Nangle, U.S. District Judge for the Eastern District of Missouri, sitting by designation.

for entry into intermediate care facilities ("ICF")[1] brought a § 1983 action against officials of the Florida Department of Health and Rehabilitative Services[2] ("defendants"). The suit alleged that defendants were allowing eligible individuals to languish on waiting lists for Intermediate Care Facilities for the Developmentally Disabled services ("ICF/DD services") for years in violation of the Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. In 1996, the district court granted summary judgment in favor of plaintiffs, determining that 42 U.S.C. § 1396a(a)(8) requires that defendants provide ICF/DD placement to all eligible individuals with "reasonable promptness." Accordingly, in a separate order entered on August 28, 1996, the district court entered the following final judgment:

> ORDERED AND ADJUDGED that Defendants' shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who

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[1]ICF's are institutions that provide 24-hour residential care and services to severely disabled individuals with developmental disabilities. See 42 U.S.C. § 1396a(a)(10)(C)(iv); Fla. Admin. Code § 59G-4.170(d). ICF's are reimbursed for care provided to residents through the joint state-federal Medicaid program. Fla. Admin. Code § 59G-4.170(5)(a).

[2]In 1996, the Department of Health and Rehabilitative Services was redesignated as the Department of Children and Family Services. See Doe v. Chiles, 136 F.3d 709, 711 n.1 (1998). In November of 1998, Jeb Bush was elected Governor of Florida. He subsequently replaced all of the individuals who had been the named defendants in the original action. Upon defendants' motion for substitution of parties, the case style was changed to reflect these new defendants.

are eligible for placement in ICF/DD institutional care facilities.

On appeal, this Court affirmed the district court. See Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998).

A. THE CONTEMPT ORDER

On June 16, 1998, two months after this Court affirmed the district court's final judgment order, plaintiffs filed a motion for contempt arguing that defendants had not taken any steps to comply with the final judgment. On November 4, 1998, the district court conducted a show cause hearing on whether defendants should be held in contempt. At the hearing, defendants estimated that there were 600 developmentally disabled individuals in need of ICF/DD services who were not receiving them. That number represented an estimate of the individuals who had requested or were likely to request ICF/DD services, and was not based on individualized eligibility assessments.[3]

Following the show cause hearing, on November 10, 1998, the district court determined that defendants were not complying with the final judgment, but it did not hold them in contempt. Instead, the district court entered an order that allowed additional time to complete "specific acts of compliance." The defendants were ordered to provide Medicaid services to the "named members of the class," to identify and locate for immediate delivery of ICF/DD services the 600 persons whom defendants had estimated were eligible for those services, and to fully comply with the final judgment

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[3]Defendants now argue that the 600 number was an inaccurate estimate that included people who were seeking any "alternative residential placements," and that they never identified any specific individuals who were actually in need of ICF/DD services.

"as to all members of the numbered class."

On January 11, 1999, defendants filed their plan of compliance, setting forth the steps they had taken or intended to take in order to comply with the 1996 final judgment. On May 24, 1999, the district court conducted a three day hearing in order to determine whether the defendants were complying with the 1996 judgment. On October 7, 1999, the court held the defendants in contempt for failure to comply with that final judgment and it fined them $10,000 per day "until a comprehensive plan, which comports with the letter and spirit of the [final judgment] is submitted, ready for implementation." The validity of the contempt order is the subject of the first half of the consolidated appeal.

B. THE CLASS CERTIFICATION ORDER

Plaintiffs originally captioned their complaint as "Civil Complaint (class action)." The complaint stated repeatedly that it was filed on behalf of the named plaintiffs and those "similarly situated." On July 1, 1992, plaintiffs filed a motion to certify the class. The magistrate judge filed a report and recommendation ("R&R") on the certification issue on August 26, 1996, recommending that plaintiffs' motion to certify the class be granted. The R&R described the scope of the class as follows:

> all developmentally disabled individuals in the State of Florida who are entitled to Intermediate Care Facilities for the Mentally Retarded ("ICF/MR") placement but have not received a placement with reasonable promptness.

Although the district court received the R&R two days prior to entering final judgment, and acknowledged as much, the court entered final judgment without addressing the class certification issue. In that same final judgment order, the district court denied as moot all pending motions, including presumably, plaintiffs' motion for class certification. The district court did not address the class certification issue again

before entering its contempt order in 1999.

In their appeal of the district court's October 7, 1999 contempt order, one of the arguments the defendants made was that no class had ever been certified. Aware of that, the district court, on February 11, 2000, sua sponte and without notice to the parties, entered an order adopting the magistrate's four-year-old R&R and granting class certification. The district court's decision to certify a class at that late date was motivated by the defendants' appeal of the contempt order, as the court's Order Granting Class Certification acknowledged: "In a pending appeal the defendants have challenged the breadth of an order on grounds that it compels relief for a class of individuals beyond the named plaintiffs. This Order on class certification is germane to that issue and should be added to the record on appeal as a supplement." The district court modified the class that was originally proposed in the R&R to include:

> Medicaid eligible individuals with developmental disabilities who have formally requested placement in an Intermediate Care Facility ("ICF/DD") and for whom the placement would be medically and otherwise appropriate but who have not received a placement with reasonable promptness. Specifically included in this class are the approximate 600 individuals the State of Florida had identified as eligible for ICF/DD placement who have been awaiting placement for more than 90 days. (footnote omitted).

The validity of the class certification order is the subject of the second half of the consolidated appeal.

II. DISCUSSION: THE CONTEMPT ORDER

A. THE DEFENDANTS' CONDUCT

Before discussing the district court's holding that defendants were in contempt of its 1996 final judgment, we need to set out in some detail precisely what the defendants did following the issuance of the 1996 final judgment and this Court's mandate affirming that judgment, see Chiles,

136 F.3d 709.

1. Defendants Amend the Florida State Medicaid Plan

On April 27, 1998, the Federal Health Care Financing Administration approved an amendment, which had been submitted by defendants in response to the final judgment, to the Florida State Medicaid Plan. Under the amended plan, an applicant is not deemed eligible for ICF/DD services unless it is first determined that such services are medically necessary. Specifically, the plan provides:

> Intermediate Care Facility for the Developmentally Disabled (CF/DD) Service Limitations
> (1) The Recipient's need for ICF/DD services must be determined by the agency's designee[4] based on medical necessity.
> (2) The agency's designee will maintain a waiting list for persons who have been determined by the agency's designee to be eligible for, require and have chosen ICF/DD placement. The time from placement on the waiting list until admission to an ICF/DD for such persons will not exceed 90 days.

See Florida Medicaid Plan, Attachment 3.1-A(15)(1).[5]

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[4]The agency's designee is the Department of Children and Family Services.

[5]The previous incarnation of this provision of Florida's Medicaid Plan provided:

> Services in an Intermediate Care Facility for the Mentally Retarded
>
> The recipient's need must be determined by the agency based on medical necessity.

Medical necessity is defined in Florida Administrative Code § 59G-1.010(166), which provides that in order for a service to be considered "medically necessary," it must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;

2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;

3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;

4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available, statewide; and

5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

Fla. Admin. Code. § 59G-1.010(166). Under the amended plan, the defendants also look to the Code of Federal Regulations section 483.440 for further guidance on how to determine medical necessity. Subsection (b) of that section of the regulations provides that clients who are admitted into an

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See Florida Medicaid Plan, Attachment 3.1-A, effective October 1, 1992, replaced by amendment 96-12, April 27, 1998.

ICF/DD "must be in need of . . . active treatment services." 42 C.F.R. § 483.440(b). "Active treatment" is defined as "a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart," and does not include "services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program." 42 C.F.R. § 483.440(a); see also Fla. Stat. § 393.063(1) (defining "Active treatment"); Fla. Admin. Code §§ 59G-1.010(2) (defining "Active treatment plan"), & 59G-4.171(4) (establishing the recipient eligibility criteria for "Intermediate Care Facilities for the Mentally Retarded/Developmentally Disabled," including the need for "continual active treatment"). Thus, under Florida's Medicaid Plan, an individual will not be deemed eligible for ICF/DD services unless such services are "determined to be medically necessary for the individual as expressed by a need for continuous active treatment. . . ." See Central Admission Policy for Intermediate Care Facilities for Persons With Developmental Disabilities (ICF/DD) in Compliance With Doe v. Chiles.

2. Defendants Adopt the Status Tracking Survey

After entry of the final judgment, defendants designed and adopted what they deemed a "uniform assessment instrument," known as the Florida Status Tracking Survey, to determine which applicants for ICF/DD services satisfy the medical necessity standard. Under the Status Tracking Survey defendants evaluate applicants for ICF/DD services to determine if their "level of need" indicates that they require "continuous active treatment" so that ICF/DD services are "medically necessary."

The Status Tracking Survey was designed in part to evaluate an applicants' level of need for ICF/DD services in three categories: daily functioning, behavioral risk, and physical/medical status. Those individuals who score a sufficiently high level of need are deemed to require 24-hour

care for severe medical, behavioral, and functional deficits. The purpose of the Status Tracking Survey was explained during the show cause hearing by Dr. Ray Foster, who consulted with the State in developing it:

> In terms of taking a look at the [Status Tracking Survey], its purpose. . . is really to identify individuals who are at higher Levels of Need for assistance, support, intervention, service, supervision, the kinds of things that you would need in your daily life day to day, to help you eat and dress and function and get around, to take care of behaviors that would pos[e] a risk to yourself or someone else and to take care of health conditions that would require special treatment or extended periods of monitoring or supervision in some way. . . . [I]n the end the decision you have to come down to is whether or not, based on this person's characteristics and levels of need, are they high enough? Are they substantial enough? Are they enduring enough to require the top ended service that we can deliver in our State. That is really the purpose of this tool.

The new eligibility criteria contained in the Status Tracking Survey were not subject to notice and comment rulemaking and they have never been published.

3. Defendants Develop the Two-Step Review Process

Determining that an applicant has an appropriate level of need is only part of the first of two steps in defendants' revised eligibility determination process. Under the first step, after an applicant submits an initial request for services, defendants determine both whether the applicant is Medicaid eligible and, using the Status Tracking Survey, whether the applicant is eligible to receive ICF/DD services, i.e., whether such services are medically necessary. If the applicant is determined to be eligible, defendants then schedule an interview with the applicant to discuss alternative services, such as home and community-based waiver services, to ensure that the applicant

actually does want ICF/DD services.[6] Eligible applicants who do want ICF/DD services are placed on a waiting list. Under defendants' revised two-step review process, they have 90 days from the date the applicant is put on the waiting list after re-affirming the initial request for services to place that applicant in an ICF/DD facility. See Florida Medicaid Plan, Attachment 3.1-A(15)(2)

4. Defendants Apply the Status Tracking Survey and the Two-Step Review Process

Utilizing their revised criteria and admissions practices, defendants began evaluating the level of need of the 600 individuals they had previously identified to the district court as requiring ICF/DD services, plus an additional 34 individuals who were subsequently identified as potentially eligible candidates. Defendants reviewed the files of these individuals using a uniform screening instrument (not the Status Tracking Survey) that measured three indicators of eligibility: 1) Medicaid eligibility; 2) a request for ICF/DD placement; and 3) a preliminary indication that the individuals were likely to need active treatment. Of the individuals screened, only 285 were identified for further evaluation.

Most of the 285 individuals[7] who were identified as likely to meet the criteria for ICF/DD services were further reviewed

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[6]In the Home and Community Based Services Waiver Act, Title XIX of the Social Security Act, 42 U.S.C. § 1396n(c), Congress has authorized certain persons with developmental disabilities to receive Medicaid services in a community setting rather than in an institutional facility. As a result, certain individuals who would qualify for ICF/DD placement may instead elect to remain in their homes. See id.

[7]Nineteen of the 285 individuals were unavailable due to circumstances beyond the control of the defendants.

using the Status Tracking Survey to evaluate their level of need. Of those individuals, 208 were identified as having a level of need of 4, or 5, which was required at that time to support a finding of medical necessity.[8] Those 208 individuals were subsequently interviewed to determine whether they wanted ICF/DD placement or whether they would prefer home and community-based waiver services. According to defendants, of the 208 individuals, only 10 people requested ICF/DD placement after the interviews. Thus, by application of the new eligibility criteria and the revised two-step review process, the defendants reduced their initial estimate of "eligible" individuals awaiting ICF/DD services from 634 to 10.

B. THE GROUNDS FOR THE CONTEMPT HOLDING

At the show cause hearing, the defendants argued that they should not be held in contempt because they had offered services to all 10 of the remaining "eligible" individuals. The district court was not impressed.

The primary reasons the court gave for finding the

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[8]The Status Tracking Survey scoring system is composed of five levels of need. When the plan of compliance was originally submitted to the district court, only those applicants who scored level 4 or 5 were considered eligible to receive continuous active treatment in an ICF. However, when the defendants applied the Status Tracking Survey criteria to those individuals who had been admitted to ICF's before the change in criteria, they determined that only 78% of those individuals would have scored a 4 or 5. Accordingly, the defendants have since lowered the qualifying score to 3, which covers 91% of the people residing in ICF's. Defendants also represented to the district court that they were in the process of contacting those individuals who had scored a 3 in order to offer them ICF/DD services.

defendants in contempt of its 1996 final judgment can be organized and listed as follows: 1) defendants had failed to seek adequate funds from the Florida Legislature to comply with the judgment, then had claimed inadequate funds as a basis for their non-compliance; 2) defendants had sought to avoid the effects of the final judgment by making procedurally and substantively improper changes to the state law criteria used to determine eligibility for ICF/DD services; 3) pursuant to the revised two-step application review process, defendants had offered eligible plaintiffs "phantom choices" of community-based treatment alternatives, and had unreasonably interpreted the final judgment as allowing them two successive 90-day time periods in which to determine eligibility for and then ensure the provision of, ICF/DD services; and 4) defendants had offered improper or inappropriate ICF/DD services to feign compliance.

C. STANDARD OF REVIEW

We generally review civil contempt orders for abuse of discretion, see Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1545-46 (11th Cir. 1996), and we review findings of fact arising out of contempt proceedings under the clearly erroneous standard, see Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991). "[T]he focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990) (citations omitted). But "a civil contempt order may be upheld only if the proof of the defendant's contempt is clear and convincing." McGregor v. Chierico, 206 F.3d 1378, 1383 (11th Cir. 2000). "This clear and convincing proof must . . . demonstrate that 1) the allegedly violated order was valid and lawful; 2) the order was clear, definite and unambiguous; and 3) the alleged violator had the ability to comply with the order." Id. (internal marks and

citation omitted).

D. ANALYSIS

1. Defendants' Threshold Arguments

Before turning to the four grounds underlying the district court's contempt holding, we will first address two arguments the defendants make that do not specifically involve those grounds. They argue in effect that the district court erred by finding them in contempt for failing to provide relief to an extent and on a scale not contemplated by the 1996 final judgment.

a. Defendants' Reading of the Final Judgment

Defendants' first argument is that the final judgment, strictly construed, required only that they amend Florida's Medicaid Plan to include "a reasonable waiting list time period" for the provision of ICF/DD services and not that they actually provide those services within a reasonable time. Defendants point out that they have already made an amendment to the Plan adopting the required reasonable waiting list time period. Attachment 3.1-A of the Florida Medicaid Plan, which was amended on April 27, 1998, now provides that:

> (2) The agency's designee will maintain a waiting list for persons who have been determined by the agency's designee to be eligible for, require and have chosen ICF/DD placement. The time from placement on the waiting list until admission to an ICF/DD for such persons will not exceed 90 days.

The contention is that the final judgment did not require the defendants to actually admit those on the waiting list to an ICF/DD as their own amendment to the Plan requires, and that the district court should not have concerned itself with whether

the required waiting list time period was actually making any difference in the provision of services.

This contention is untenable. The defendants themselves have not previously interpreted the final judgment so narrowly. For example, in the Emergency Motion to Stay the Final Judgment, which the defendants filed on October 23, 1996, they argued: "Without a stay of the Final Judgment, defendants will be required to immediately begin to create additional institutional infrastructure in the form of bricks and mortar," and that "[p]resumably, if there are not sufficient ICF/DD beds available, the Final Judgment would require the actual construction of facilities within 90 days, an impossible feat." The defendants' new-found interpretation of the final judgment is also directly at odds with our prior interpretation of it. In Chiles, we rejected the defendants' argument that the district court abused its discretion "in enjoining them to provide the Medicaid services at issue within ninety days." 136 F.3d at 721-22.

b. Class-Wide Relief

Although the district court observed in the second sentence of the contempt order that this lawsuit was brought by "thirteen developmentally disabled individuals," the court did not hold the defendants in contempt for failing to timely provide ICF/DD services to those thirteen plaintiffs. Instead, it appears that the court based its finding of contempt, in part, on the defendants' alleged failure to provide services on a system-wide or class-wide basis.[9] Accordingly, one of the grounds of

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[9]For example, prior to finding the defendants in contempt, the district court ordered them to complete specific "acts of compliance." The defendants were ordered to provide Medicaid services to the "named members of the class," to identify and locate for immediate delivery of ICF services the 600 persons whom defendants had estimated were

the defendants' challenge to the contempt order is that the district court exceeded the scope of the final judgment by ordering defendants to provide class-wide relief. This ground of challenge raises issues about the existence of a formally certified class and an implied class.

(i) The Existence of a Certified Class

The defendants contend that they cannot be held in contempt of the 1996 final judgment for failure to provide services to members of the "class" because no class had been properly certified prior to the issuance of the contempt order. Specifically, they say that:

> The contempt order attempts to enforce class-wide relief, apparently for all developmentally disabled people in Florida wanting services. The district court neither defined (and hence appropriately limited) this class, nor did it certify the class.

The district court did not certify a class before issuing its 1996 final judgment or at any time while the case was still properly before it. Although the magistrate judge had recommended that plaintiffs' motion for class certification be granted, the district court did not adopt the magistrate's recommendation or otherwise resolve the class certification question before entering final judgment. Instead, at the time the court issued its final judgment it appears to have deliberately decided not to certify a class. The court still had not done so four years later when it found the defendants in contempt. The court explicitly recognized as much in the contempt order, stating: "Only 634 eligible individuals are plaintiffs in this lawsuit as an order certifying a class was never

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eligible for those services, and to fully comply with the final judgment "as to all members of the numbered class." And in the contempt order itself, the court stated that "[o]nly 634 eligible individuals are plaintiffs in this lawsuit . . . ."

entered."

However, as we discuss in the next section, the fact that the district court failed to properly certify a class does not necessarily establish that no class exists, or that the defendants cannot be held in contempt for failing to provide class-wide relief.

(ii) The Existence of an "Implied Class"

In three pre-split Fifth Circuit cases, this Court addressed the question of whether the absence of a proper class certification order entered pursuant to Fed.R.Civ.P. 23 was necessarily fatal to the putative class members' claims. See Johnson v. Gen. Motors Corp., 598 F.2d 432 (5th Cir. 1979); Bolton v. Murray Envelope Corp., 553 F.2d 881 (5th Cir. 1977); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973). Those decisions are binding upon us, see Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), and we find their reasoning fits the circumstances of this case. Accordingly, although we recognize that the district court failed to properly certify a class, we conclude, nevertheless, that an "implied class" exists.

In Bing, the plaintiffs filed their complaint as a class action but did not subsequently move the district court for a class certification order and one was never entered. 485 F.2d at 446. Regardless, the former Fifth Circuit stated "we may infer that the trial court approved the class action nature of this lawsuit" and held that the class relief could stand. Id. In reaching its conclusion, the court was persuaded by several factors, including: 1) that the complaint was brought on behalf of the plaintiff and "all others similarly situated"; 2) that the defendants never objected to the "class nature" of the action; 3) that the trial court made statements that suggested it thought the case was a class action; and 4) the judgment rendered by the district court contained relief that was "aimed at a class of people." Id. at 446-47. The Bing Court concluded that because "[defendant] discriminated against a class, class relief was

sought, and class relief was given. . . . To say that this is not a class action would be to ignore the substance of the proceedings below in favor of an excessively formalistic adherence to the Federal Rules of Civil Procedure." Id. The Court went on to conclude that the type of class as well as the identity of the class members could be determined from the nature of the relief contained in the judgment. Id. at 447-48. Bolton reaffirmed the holding in Bing and also recognized that, as a general matter, a Rule 23(b)(2) class does not require class-wide notice as a precondition for its existence.[10] 553 F.2d at 883; see also e.g., Jefferson v. Ingersoll Intn'l Inc., 195 F.3d 894, 897 (7th Cir. 1999) ("Rule 23(b)(2) authorizes a no-notice and no-opt-out class for 'final injunctive relief . . . [that operates] with respect to the class a whole.'"); Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1995) (observing that the right to notice does not apply to class actions brought under Rule 23(b)(2)); Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 506 (5th Cir. 1981) (same).

In Johnson, the issue was whether a plaintiff who was seeking monetary damages was barred from so doing by the preclusive effect of a prior class action. Johnson, 598 F.2d at 434. The plaintiff argued that he was not barred because, among other reasons, the class in the preceding action had never been certified. Id. Relying on Bing, the Johnson court rejected plaintiffs' argument. Id. at 435. In the course of doing so, it construed the holding in Bing as turning on the district court's, and not the parties', treatment of the action as a class action. Id. As the Johnson court stated, "In short, it is beyond dispute that despite the lack of a proper order certifying [the

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[10]Fed.R.Civ.P. 23(b)(2) provides that a class may be maintained where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

previous action] as a class suit, the case was in fact a class action and was specifically described and treated as such both at trial and on appeal." Id.

There are a number of decisions from other jurisdictions that contain language consistent with Bing's holding. See e.g., Senter v. Gen. Motors Corp., 532 F.2d 511, 522 (6th Cir. 1976) (recognizing that, although the district court should have ruled on the class certification issue prior to resolving the merits, "the simple fact is that no one was misled as to the class nature of the action"); see also Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325 (1st Cir. 1991) (under similar facts as in the present case, the First Circuit held that even in the absence of a Rule 23 certification order, "because this case was instituted by a complaint seeking class relief, implicitly granted class relief, and was conducted for years as a de facto class action, it should and may be recognized as such"); Graves v. Walton County Bd. of Educ., 686 F.2d 1135, 1139-40 (5th Cir. 1982) ("[I]t is clear that despite the lack of a formal order certifying this case as a class suit, this case was in fact a class action and was specifically described and treated as such by the parties and the trial court.").

The present case is a strong one for recognizing the existence of an implied class. The plaintiffs filed this suit as a class action and timely filed for class certification. The magistrate judge recommended that class certification be granted. The plaintiffs acted at all times as though the relief entered would extend system-wide. So did the district court. It referred to plaintiffs as a "class" in the final judgment, stating:

> Currently pending, and rendered moot by this Order, is Plaintiffs' Emergency Motion for Preliminary Injunction. . . . [T]he concerns expressed in that motion are adequately addressed in a . . . case pending before this Court. . . . Plaintiffs in this action, as a class, may intervene in [that] action.

(emphasis added). This Court also appears to have treated the

case as involving Medicaid applicants other than the named plaintiffs, stating;

> [The plaintiffs] have certainly established that the [defendants'] ongoing violation of federal law is "systemwide." . . . The record reveals that hundreds, perhaps even thousands, of eligible developmentally disabled persons are not being provided ICF/DD services with anything resembling reasonable promptness. Consequently, we reject the [defendants'] contention "that there was no showing of statewide or 'system' wide injury."

Chiles, 136 F.3d at 722 n.23.

Moreover, the defendants themselves have always understood that the relief granted in the final judgment was intended to be system-wide, and not just limited to the named plaintiffs. For example, in Defendants' Emergency Motion to Stay Final Judgment, filed October 23, 1996, they argued: "Without a stay of the Final Judgment, defendants will be required to immediately begin to create additional institutional infrastructure in the form of bricks and mortar," and that "[p]resumably, if there are not sufficient ICF/DD beds available, the Final Judgment would require the actual construction of facilities within 90 days, an impossible feat." In defendants' argument on appeal from the final judgment they stated that the "system wide relief" in the "judgment below" was erroneous as "there was no showing of statewide or 'system' wide injury." And at the November 8, 1998 show cause hearing, counsel for defendants agreed with the court that an estimated 600 people were then in need of ICF/DD services but argued that defendants should not be held in contempt, stating: "It does take time. There are a lot of people, [a] lot of considerations. These decisions, even though this is a class action, these are ultimately individualized decisions." (emphasis added).

Notwithstanding all of this, the defendants say that they have always contested class certification. True, but they only contested formal class certification; they did not contest the

system-wide nature of the relief contemplated by the final judgment. That much is evident from the objections they submitted to formal class certification, where they argued: "Class Certification is Unnecessary Because the Benefits Of the Relief Sought Will Inure To All Individuals [who are potential] Members Of The Proposed Class" and that "no useful purpose would be served by permitting the case to proceed as a class action inasmuch as the injunction sought would benefit all members of the proposed class." It was not until the contempt proceedings – nearly four years after entry of final judgment – that defendants first suggested that the relief ordered in the final judgment should be limited to the named plaintiffs. In other words, everyone involved in this case, including the defendants themselves, always treated the relief sought and provided in the final judgment as extending system-wide, until the threat of contempt sanctions inspired the defendants to see things differently for the first time. We do not share their vision.

Additional factors militate in favor of recognizing the existence of an implied class in this lawsuit. Plaintiffs did not occasion the delay in certifying the class. They should not be penalized because the district court either forgot to address the certification question sooner, or determined that it was not necessary to do so. See Senter, 532 F.2d at 521 (recognizing that "[t]he language of Rule 23 (c)(1) is obviously directed to the District Court. It does not impose upon a plaintiff the additional burden of ensuring that the District Court adhere to 23(c)(1)'s directive."). Moreover, as in Bing, it is a simple matter to determine the type and scope of the class by looking to the relief contained in the final judgment. As to its type, because we are dealing with injunctive relief, the class is a Rule 23(b)(2) class, and would not require that notice be given to all potential class members. See Bolton, 553 F.2d at 883. As to its scope, the district court defined the relief as follows:

> ORDERED AND ADJUDGED that Defendants' shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who

> are eligible for placement in ICF/DD institutional care facilities.

The general parameters of the class include all "individuals who are eligible for placement in ICF/DD institutional care facilities."

This is also how we viewed matters in our prior opinion in this case where we construed the final judgment language to mean "that [defendants] must incorporate into their present scheme of providing services procedures that ensure a waiting list period of not more than ninety days." Chiles, 136 F.3d at 721. That language clearly envisioned a system-wide revision, as is also evident from our recognition that "perhaps . . . thousands" of individuals were being denied ICF/DD services in violation of federal law. Id. at 722 n.23.

Therefore, to the extent such recognition is necessary,[11] we recognize the existence of an implied class in this case. We also hold that the existence of that implied class defeats the defendants' challenges to the contempt order premised on the court's failure to certify a class. The parameters of the implied class are as follows:

> Medicaid eligible individuals with developmental disabilities who have requested, and have been determined eligible for, placement in an Intermediate Care Facility ("ICF/DD") but who have not received a placement with reasonable promptness.

To keep the paper current, the district court should enter an

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[11]Given the nature of the relief at issue, it is not entirely clear that there is a need to recognize a class at all. The relief contained in the final judgment should inure to all Medicaid-eligible developmentally disabled individuals who are eligible for, and request, ICF/DD services. After all, it would seem axiomatic that defendants cannot continue to violate 42 U.S.C. § 1396a(a)(8) as to everyone except the named plaintiffs.

order to that effect upon remand.[12]

2. The Four Grounds Underlying the Contempt Holding

We turn now to the four grounds, which we have previously listed, upon which the district court based its contempt order.

a. The Inadequate Funding Ground

The first ground is that the defendants sought inadequate funds from the Florida Legislature to comply with the final judgment. The district court stated that the defendants had requested only enough funds to reduce the waiting list by 53%, from which the court "inferred that there was never an intent to timely comply with the mandate of the Eleventh Circuit or this Court's Order."

However, the district court made its inadequate funding determination based upon the estimated "[t]wenty-three thousand individuals" who are currently on waiting lists for services. That number is not even close to the number of individuals who were actually eligible for IFC/DD services but who had not yet received them at the time of the contempt hearing. As we have previously discussed, the defendants estimate, and the plaintiffs do not appear to seriously disagree, that the number of individuals actually eligible for placement in IFC/DD facilities but who had not been placed at the time of the hearing is 634.[13] Indeed, the district court pretty much

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[12]In Part III of this opinion, below, we vacate the court's February 11, 2000 class certification order because the court was without jurisdiction to enter it when the court did. The district court will regain jurisdiction when this case returns to it on remand.

[13]The original estimate was 600, but 34 individuals were subsequently added to the estimate.

adopted that number in both its November 10, 1998 order and in the contempt order itself, where the court stated, "[o]nly 634 eligible individuals are plaintiffs in this lawsuit. . . ." The defendants insist that the 23,000 figure represents an estimate of all individuals with developmental disabilities who may need some state services of some kind, although only a small fraction of that number need ICF/DD services.[14] The plaintiffs do not disagree.

"Civil contempt proceedings are brought to enforce a court order that requires a party to act in some defined manner." Chairs v. Burgess, 143 F.3d 1432, 1436 (11th Cir. 1998) (internal marks omitted). Here, the final judgment did not require the provision of services to any and all developmentally disabled individuals, nor did it require the provision of any Medicaid services other than ICF/DD services. Therefore, to the extent that the district court based its finding of contempt on defendants' failure to request sufficient funds to provide ICF/DD services or any other kind of services to 23,000 individuals, it erred.

b. The Modification of Eligibility Grounds – The Status Tracking Survey

The second ground upon which the district court relied to find defendants in contempt involves their modification of the eligibility requirements, which they accomplished through the development and implementation of the Status Tracking Survey. The final judgment ordered the defendants to provide services within 90 days "for individuals who are eligible for placement in ICF/DD institutional care facilities." What the district court found is that instead of providing ICF/DD services to the then-estimated 634 individuals who were "eligible for

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[14]The defendants did not indicate whether the "services" sought by these 23,000 individuals was limited to Medicaid services.

placement in ICF/DD institutional care facilities, " the defendants changed the definition of "eligibility" for placement in those facilities in order to eliminate all but ten of the 634 people from eligibility. The district court reasoned:

> The consequence and obvious intent of adopting the experimental [Status Tracking Survey] tool for assessing need has been to remove a large number of individuals from the list of those eligible for and receiving ICF/DD services. Circumvention of the final judgment entered in 1996, which ordered that services be provided to identified eligible individuals, is thus effectively accomplished.

The court did not have any problem with the defendants requiring medical necessity as an eligibility criterion for ICF/DD services.[15] But it had serious problems with the use

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[15]The plaintiffs have not argued to us that medical necessity is an invalid criterion and could not legitimately do so. A state that elects to participate in Medicaid has the option of not providing ICF/DD services at all. See 42 U.S.C. § 1396a(a)(10)(A)(ii); 42 C.F.R. § 440.225 ("Any of the services defined in subpart A of this part [which includes the definition of ICF services found at 42 C.F.R. § 440.150] that are not required under § 440.210 and 440.220 [ICF services are not] may be furnished under the State plan at the State's option."). If a state elects to provide ICF/DD services, as Florida has, it must set its eligibility standards in accordance with certain broad federal rules. See 42 C.F.R. § 430.0 ("Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures."). Section 1396d(a)(15) provides that the state may elect to provide such services "for individuals who are determined, in accordance with section 1396a(a)(31)(A) of this title, to be in need of such care." 42 U.S.C. § 1396d(a)(15). Section 1396a(a)(31)(A) provides that when the State elects to

of the Status Tracking Survey to determine medical necessity, and those problems were a large part of the reason the court concluded that the defendants were in contempt of its 1996 final judgment order. The district court did not suggest that the defendants would have been in contempt for making valid changes to the criteria used to determine eligibility, but instead concluded that their conduct was contemptuous because the changes they made with the adoption of the Status Tracking Survey were procedurally and substantively invalid.

The district court thought that adoption of the Status Tracking Survey constituted unlawful rulemaking. The court also determined that the Status Tracking Survey is not a

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provide such services, the State Medicaid Plan must provide for a "written plan of care, prior to admission to or authorization of benefits in such facility, in accordance with regulations of the Secretary." 42 U.S.C. § 1396a(a)(31)(A). The relevant regulations provide that "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose," 42 C.F.R. § 440.230(b) and that otherwise, "[t]he agency may place appropriate limits on a service based on such criteria as medical necessity. . . ." 42 C.F.R. § 440.230(d).

What all of those statutory provisions and regulations mean is that the defendants were free to limit the provision of ICF/DD services to only those applicants for whom ICF/DD services were deemed medically necessary. See Rush v. Parham, 625 F.2d 1150, 1155 (5th Cir. 1980) ("[T]he Medicaid statutes and regulations permit a state to define medical necessity in a way tailored to the requirements of its own Medicaid program."); King by King v. Sullivan, 776 F.Supp. 645, 651 (D.R.I. 1991) ("[T]he medical eligibility criteria for ICF-MR placement under the State Plan require 'medical necessity'. . . . Such a restriction on eligibility is proper . . . .").

"complete or ready" screening tool and that it is contrary to the substance of the federal Medicaid statute. In particular, the court noted that the Status Tracking Survey does not require a certification of need by a physician and does not provide for an interdisciplinary evaluation prior to admission to an ICF/DD facility. The court also thought that the Status Tracking Survey does not address many important factors that should be considered under the federal Medicaid statute in determining the need for continuous active treatment. Finally, the court found the Status Tracking Survey lacking because it did not include safeguards in the form of an independent review of adverse eligibility determinations.

The reasoning that led the district court to conclude that creation and use of the Status Tracking System to determine medical necessity violated the 1996 final judgment order appears to have been this: 1) the new eligibility criteria contained in the Status Tracking System are invalid, either because they were adopted in a procedurally defective manner or because they are substantively in violation of the Medicaid statute, or because they are simply unreliable; 2) using those new criteria the defendants denied ICF/DD services to a number of individuals; 3) many of these individuals would have been eligible under the old criteria; 4) with the result that defendants have failed to timely provide ICF/DD services to individuals who are "truly eligible," meaning eligible under the original criteria which are the only remaining ones after the Status Tracking Survey is thrown out. Therefore, the reasoning goes, the defendants improperly circumvented and thereby violated the final judgment.

The district court's finding of contempt cannot stand if the first premise set out above, which is that the Status Tracking Survey is invalid, falls. The district court gave four reasons for concluding the Status Tracking Survey was invalid, and we take up each one of those reasons in turn.

(i) Rulemaking and Procedural Requirements

The district court held that the Status Tracking Survey was procedurally invalid because it had been adopted "without

following formal rulemaking procedures and without publishing the changes so that the public could understand how eligible persons would be affected." That failure to comply with rulemaking requirements was fatal, in the court's view.

(1) Compliance with the APA

In holding that the defendants, in adopting the Status Tracking Survey, failed to comply with administrative rulemaking requirements,[16] the district court cited both federal cases applying the federal Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), as well as state cases applying Florida's Administrative Procedure Act, Fla. Stat. § 120.52 et seq. See Cleveland Clinic Florida Hosp. v. Agency for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st Dist. Ct. App. 1996). ("The statutory framework under which administrative agencies must operate in [Florida] provides ... mechanisms for the adoption or amendment of rules."). However, the federal APA clearly does not apply to state agencies. See 5 U.S.C. § 701(b)(1) (defining "agency" as certain authorities of the "Government of the United States").

Moreover, to the extent that the defendants were in violation of Florida's own administrative procedures act, federal courts do not have the authority to compel state actors to comply with state law. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."); see also Walker v. Mintzes, 771 F.2d 920, 933 (6th Cir. 1985) ("[A] federal court should not

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[16]For purposes of this analysis, we assume, without deciding, that the adoption of the Status Tracking Survey constituted "rulemaking."

rule upon the validity of a state regulation challenged on the sole ground that it was not properly adopted under state law by the state administrative agency.").

There is, to be sure, some authority holding that a state administrative agency's violation of state law can, under certain circumstances, also constitute a violation of federal law thereby avoiding the Eleventh Amendment problems described in the Pennhurst opinion. In Barnes v. Cohen, 749 F.2d 1009 (3rd Cir. 1984), the Third Circuit determined that state officials were not adhering to their own regulations that were passed in accordance with the Aid to Families with Dependent Children ("AFDC") program. Id. at 1018. In response to the state's argument that such a holding contravened Pennhurst, the Court pointed to 42 U.S.C. § 602(a)(1), which requires state AFDC plans to "be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." Id. at 1019. The Court interpreted that provision as requiring states to adhere to their own AFDC regulations, and held that the state's violation of its own regulations also constituted a violation of 42 U.S.C. § 602(a)(1), rendering Pennhurst inapplicable. Id.; see also Wisconsin Hosp. Ass'n v. Reivitz, 820 F.2d 863, 868 (7th Cir. 1987) ("The decree might seem to raise problems under [Pennhurst] . . . but it does not, because the federal regulations make compliance with the state plan . . . a federal duty.").

A similar argument could be made in this case because section 1396a(a)(1) of the Medicaid Act contains language identical to that found in 42 U.S.C. § 602(a)(1).[17] See 42 U.S.C.

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[17]Section 1396a(a)(1) provides:

> A State plan for medical assistance must –
> (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them.

§ 1396a(a)(1). But see Oberlander v. Perales, 740 F.2d 116, 119 (2d Cir. 1984) (rejecting a similar argument regarding section 1396a(a)(1) as "tortuous," noting that "there is no authority anywhere supporting the proposition that a state Medicaid regulation becomes a federal law merely by virtue of its inclusion in a state plan required by federal law.").

But even if we were inclined to adopt the reasoning set out by the Third Circuit in Barnes, it would not apply to the facts of this case. Here, unlike Barnes, the defendants are not alleged to have violated a state Medicaid regulation or a provision of the state Medicaid plan. Instead, the district court determined that defendants violated certain general rulemaking requirements set forth in Florida's Administrative Procedure Act. There is nothing in the federal Medicaid statute or regulations that would require the defendants to follow Florida's APA. As this Court has previously explained in another Medicaid case where we distinguished Barnes:

> Assuming arguendo that Pennhurst II is not applicable to a case such as that described in Barnes v. Cohen, we hold that we are not faced with such a situation. [Plaintiff] has not alleged that [the commissioner of the Alabama Medicaid Agency] has violated the state Medicaid plan or regulations promulgated pursuant to the state Medicaid plan. Instead he argues that [the commissioner] has not complied with the state constitution and with state statutes which are not part of the Medicaid plan. Thus, the principles announced in Barnes are not relevant here.

Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986). We have the same situation here, and our holding in Silver fits this case precisely.

Thus, the federal APA did not apply to the defendants' adoption of the Status Tracking Survey, and any violations of Florida's APA are not cognizable in this type of federal court proceeding. Therefore, there is no proper basis for the district court's holding that defendants adopted the Status Tracking

Survey in a procedurally defective manner, and any procedural problems with its adoption cannot serve as a reason for holding defendants in contempt.

(2) Compliance with the Medicaid Statute

In holding the defendants in contempt, the district court also concluded that, under the Medicaid statute, "notice of the rule change" should have been provided for the numerous individuals who would have been eligible under the old criteria, but who were denied services under the revised criteria. It determined that such notice is mandated, citing 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. §§ 431.206, 431.210 431.220, 435.912 and 435.919(a).[18] If we construe the district court's statement literally – that the defendants were required to provide the plaintiffs with notice "of the rule change" – the statutory and regulatory provisions the district court relied on are inapposite. Those provisions involve only notice of denials

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[18]Section 1396a(a)(3) provides, "A State plan for medical assistance must provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied ...." Section 431.206 of the Code of Federal Regulations provides that a state agency must provide notice of an applicant's right to a hearing. 42 C.F.R. § 431.206(c). Section 431.210 sets forth the contents of that notice. 42 C.F.R. § 431.210. Section 431.220 prescribes the circumstances under which an applicant who requests a hearing is entitled to one. 42 C.F.R. § 431.220. Section 435.912 specifies that an applicant who is determined to be ineligible for Medicaid must be provided written notice of the agency's decision and an explanation of their right to request a hearing. 42 C.F.R. § 435.912. Section 435.919(a) provides that Medicaid recipients whose services are to be terminated, discontinued or suspended are to be given adequate notice. 42 C.F.R. § 435.919(a).

of individual Medicaid applications, and impose no obligation to publish notice of rule changes that will have a general impact on eligibility.

However, if we construe the district court's statement to mean only that those individuals denied services pursuant to the new criteria have a right to notice and an opportunity to be heard, then the district court is correct on that point. See e.g., Cramer v. Chiles, 33 F.Supp. 2d 1342, 1351-52 (S.D. Fla. 1999) ("Medicaid statutes require that a state provide individuals with an opportunity for a hearing before the governmental agency when a claim for medical assistance is denied or is not acted upon with reasonable promptness, including where the Medicaid agency takes action to suspend, terminate, or reduce services."); Parry v. Crawford, 990 F. Supp. 1250, 1258 (D. Nev. 1998) ("[T]he Medicaid Act clearly provides for notice upon the denial of an application. . . . In addition to denial of a claim for services, certain other actions, such as termination, reduction, or suspension of services also entitle the applicant to a hearing.") (citation omitted); Catanzano v. Dowling, 847 F.Supp. 1070, 1081 (W.D.N.Y. 1994) ("Under federal regulation, the State Medicaid agency must provide a proper notice to the patient informing him of the proposed change and his right to a hearing both at the time that the individual initially applies for Medicaid and at any time the Medicaid agency takes 'any action affecting his claim.'") (emphasis in original).

The problem with this part of the district court's reasoning is that recognizing the plaintiffs have such a right does not establish that the right was violated in this case. The court's order contains no findings that anyone who was denied services failed to receive notification of that denial or was deprived of a requested hearing. More fundamentally, even if we assume that defendants violated the Medicaid Act – either because they failed to provide notice to those denied services or they failed to provide hearings to those who requested them – that would not, by itself, establish that the defendants had violated the final judgment. The final judgment dealt only with the timely

provision of services, and not with notice and a hearing in connection with the denial of services. It follows that the defendants' failure, if any, to provide notice and a hearing cannot support the district court's finding of contempt.

(ii) Eligibility Requirements

The district court also determined that the Status Tracking Survey contravenes certain requirements of the Medicaid statute pertaining to eligibility for ICF/DD services. In particular, the court stated that the federal regulations require that "the initial certification of need for in-patient care be made by a physician and that the evaluation for admission to an ICF/DD or payment for the service be conducted by an interdisciplinary team." The court was apparently troubled by the fact that defendants employ the Status Tracking Survey to make initial eligibility determinations even though it does not provide for an initial certification of need by a physician or an evaluation by an interdisciplinary team.

While it is true that the federal Medicaid regulations prescribe certain standards and procedures that must be satisfied before an applicant can be admitted to an ICF, those provisions do not address, nor are they inconsistent with, the use of a screening mechanism to identify applicants who are not likely to need continuous active treatment services. For example, section 483.440 provides, in pertinent part:

> (b) Standards: Admissions, transfers, and discharge.
> (1) Clients who are admitted by the facility must be in need of and receiving active treatment services.
> (2) Admission decisions must be based on a preliminary evaluation of the client that is conducted or updated by the facility or outside sources.

42 C.F.R. § 483.440. Section 456.360(a) mandates that "A physician must certify for each applicant or recipient that ICF services are or were needed." 42 C.F.R. § 456.360(a). Section 456.370 provides:

> (a) Before admission to an ICF . . . an interdisciplinary team of health professionals must make a comprehensive medical and social evaluation and, where appropriate, a psychological evaluation of each applicant's . . . need for care in the ICF.

42 C.F.R. § 456.370.

None of these regulations, which are designed to ensure that only applicants who are in need of ICF services are placed in institutional care facilities, suggest that the defendants cannot use the Status Tracking Survey as a screening mechanism in addition to the procedures mandated by the regulations. The Status Tracking Survey does not supplant the mechanisms the regulations require, but instead works in concert with them to screen out applicants who are unlikely to need continuous active treatment services. Those applicants who satisfy the Status Tracking Survey will still be evaluated, prior to their admission to an ICF, in accordance with the appropriate regulations, including §§ 483.440, 456.360(a) and 456.370. Thus, to the extent that the district court's finding of contempt was predicated on the fact that the Status Tracking Survey is inconsistent with the Medicaid eligibility requirements set out in the federal regulations, the finding of contempt cannot stand.

In the context of analyzing the relationship between the Status Tracking Survey and the eligibility requirements set out in the Medicaid statute, the district court opined that the Status Tracking Survey "is not a complete or ready tool," and that "[n]othing offered by the defendants showed the survey to be a valid instrument for measuring the needs of developmentally disabled individuals." For purposes of this analysis, we will assume that conclusion represents a finding of fact that is not clearly erroneous. See generally Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991). Nonetheless, it is irrelevant to the issue of contempt.

The issue before the district court was whether the defendants had violated the terms of the final judgment. Parties cannot be held in contempt unless they have violated a clear, definite and unambiguous order. See McGregor v. Chierico,

206 F.3d 1378, 1383 (11th Cir. 2000). The final judgment did not address eligibility requirements or the efficacy of screening mechanisms. It dealt only with the timely provision of services to "individuals who are eligible for placement in ICF/DD institutional care facilities." For that reason, the defendants cannot be held in contempt based solely on the district court's appraisal of the Status Tracking Survey, even if we assume that it is "not a complete or ready tool" and that it is not "a valid instrument for measuring the needs of developmentally disabled individuals."

(iii) Continuous Active Treatment Requirements

The district court also questioned the validity of the Status Tracking Survey on grounds that it fails to include all of the factors Medicaid requires to be considered when determining an individual's need for continuous active treatment. The court was specifically concerned with the Status Tracking Survey's failure to contain any provisions to ensure that applicants who are denied services do not regress to the point of needing them. Although the district court did not cite any statutory or regulatory provision requiring anti-regression care, it may have had in mind 42 C.F.R. § 483.440(a)(1). That regulation defines active treatment as:

> [A] continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward –
> (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
> (ii) The prevention or deceleration of regression or loss of current optimal functional status.

42 C.F.R. § 483.440(a)(1). Another part of the same section also requires that "[c]lients who are admitted by the facility must be in need of and receiving active treatment services." 42

C.F.R. § 483.440(b)(1).

Regulations such as section 483.440 establish certain requirements that ICF facilities must satisfy in order to participate in the Medicaid scheme. See 42 C.F.R. § 483.400 - 483.480. More specifically, section 483.440 imposes two requirements relevant to the present discussion. First, it establishes the minimum level of services that an ICF facility must provide before the facility will be permitted to participate in Medicaid. See 42 C.F.R. § 483.440(a)(1). As the district court correctly observed, those services must be designed to prevent the regression of a client's functional status. Second, it establishes that individuals who are admitted to a facility must satisfy a certain baseline level of need before the facility which houses those clients will be allowed to participate in the Medicaid scheme. See 42 C.F.R. § 483.440(b)(1). If an ICF admits those who fall below the baseline level of need prescribed in section 483.440(b)(1), then that facility will not qualify to participate, at least with respect to those individuals.

However, to say, as the regulation does, that applicants who are admitted to ICF's must be in need of active treatment services, is not the same as saying that all applicants who are in need of active treatment services must be admitted to ICF's. This is an important distinction, one that is fundamental to the joint federal-state Medicaid scheme. As we have explained previously, the federal Medicaid statute does not require states to provide ICF/DD services. See 42 U.S.C. § 1396a(a)(10)(A)(ii). And states that elect to provide those services are granted substantial discretion in the formulation of their eligibility standards. See 42 C.F.R. § 430.0. Section 483.440 requires only that participating facilities provide ICF/DD services in a particular manner and solely to those individuals who truly need them. It does not require that ICF/DD services be provided to any individual who might benefit from them.

(iv) Review Requirements

The district court's final criticism of the Status Tracking Survey is that it does not provide for review of adverse decisions that result from application of its criteria, and that the absence of such review procedures renders the Status Tracking Survey "substantively faulty." The court explained:

> [U]se of the [Status Tracking Survey] as a screening mechanism is substantively faulty because it . . . fails to provide for an independent review of an adverse determination. . . .There are no safeguards against arbitrariness in canceling services to persons now receiving or who were eligible for ICF/DD services. The claimed protection against unfair cancellation of services, according to the defendants, is an examination of records by the agency's in-house physician. First, as previously noted, the review is not independent. Second, the records are admittedly incomplete for an adequate review . . . . Assuming that the [Status Tracking Survey] could be constructed to serve as a valid instrument it is clear that much is left to be done.

Those may (or may not) be valid criticisms of the Status Tracking Survey, but the district court did not identify any particular provision of the Medicaid statute or its accompanying regulations that would require a different review procedure. More fundamentally, the district court's reasoning goes outside of the appropriate boundaries of the contempt proceeding. The defendants cannot be held in contempt of the 1996 final judgment, which says nothing about review mechanisms, simply because they adopted a "faulty" one.[19]

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[19]Even if we were to assume that the Status Tracking Survey violates a substantive provision of federal law and is therefore invalid, that conclusion, by itself, would not provide a sufficient basis for holding defendants in contempt of the final judgment. The district court thought that by

(v) Summary

The district court's holding that defendants were in contempt of its 1996 final judgment was based in large part on the premise that the Status Tracking Survey was procedurally and substantively invalid. That premise does not withstand scrutiny. So far as procedural rulemaking requirements are concerned, the federal APA does not apply to the defendants' adoption of the Status Tracking Survey, and violations of state administrative procedure law are not cognizable in federal court in the circumstances of this case. It has not been established that the defendants' development and implementation of the Status Tracking Survey violates any provision of the Medicaid

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using the "invalid" Status Tracking Survey defendants had failed to timely provide ICF/DD services to individuals who would have been eligible had they been evaluated under the pre-Status Tracking Survey criteria. But even so, the defendants could not have been found in contempt unless the district court identified at least one individual who was eligible for ICF/DD placement under the original criteria, but who was left on a waiting list for more than 90 days as a result of the Status Tracking Survey. The district court made no such findings.

Though it was not a basis of contempt that was discussed in the district court's order, the plaintiffs also argue on appeal that the new eligibility criteria violates their substantive due process rights. They argue that Florida has created a right to ICF/DD services in a particular class of individuals - its Medicaid-eligible, developmentally disabled citizens - and cannot now deprive those individuals of that right without due process of law. Regardless of the validity of this argument, a matter about which we express no opinion, it cannot serve as an independent basis for upholding the district court's finding of contempt, which is the only issue before us.

statute or its accompanying regulations. Finally, even if the Status Tracking Survey is a faulty screening mechanism, that alone does not violate the terms of the 1996 final judgment. So, any perceived or actual flaws in the Status Tracking Survey cannot serve as a basis for holding the defendants in contempt for failure to comply with the 1996 final judgment.

c. The Two-Step Review Process

Moving beyond the Status Tracking Survey issues, the next two grounds upon which the district court found defendants in contempt involve defendants' two-step application review process that is initiated when an applicant applies for ICF/DD services. An application triggers two simultaneous inquiries: an inquiry as to whether the applicant is Medicaid eligible and also an inquiry as to whether the applicant is eligible for ICF/DD services. Under defendants' interpretation of the law, they have 90 days to complete these two inquiries, which are together the first step of the process.

If the applicant is determined to be eligible for ICF/DD services under Medicaid – the first step of the process – defendants then schedule an interview with the applicant to explain the availability of alternative services, specifically home and community-based waiver services, and to offer the applicant the choice between those and ICF/DD services. If the applicant chooses ICF/DD services after the interview, then there is a maximum 90 day waiting period for the provision of services set out in the final judgment, and that 90 day period does not begin running until the first step of the process is completed. The result is that under defendants' two-step application review process, from the time the applicant initially requests ICF/DD services, defendants allow themselves not one but two successive 90 day time periods to place the applicant in a facility. The district court had two problems with the defendants' two-step application process that contributed to its conclusion that they had violated the 1996 final judgment.

(i) Phantom Choices

First, the district court was persuaded that defendants were offering applicants "phantom choices" between ICF/DD services and the alternative community-based waiver services. Specifically, the court was concerned that applicants were not being told that if they elected to receive the alternative services they were not assured of receiving them in the immediate future.

But the final judgment only involved the time period for providing ICF/DD services. It said nothing at all about the provision of any other type of services, nor did it even specify how the defendants were to go about offering ICF/DD services. As we made clear in our prior decision in this case: "The plain language of the district court's injunction does not prevent the appellants from continuing to pursue the home and community-based waiver services program in accordance with federal statutory and regulatory dictates." Chiles, 136 F.3d at 721. Counsel for the plaintiffs recognized as much, in a statement made at a hearing before the district court that we cited in Doe v. Chiles:

> Our position to the state has always been, if they want to provide everybody with services so that they don't need to be taken out of their current housing arrangement ... that's great. There won't be a lawsuit. They are always welcome to provide services to people in the manner in which they see fit. . . And if ... they want to entice people away by offering some other package of services, that's great.

136 F.3d at 721 n.22.

(ii) The Ninety-Day Time Period

The second problem the district court had with the two-step review process concerned what it termed the "unreasonable" construction by the defendants of the final judgment as

allowing them 90 days from the date of the initial request for services to determine eligibility, plus an additional 90 days to actually place an applicant in an ICF/DD facility who is determined to be eligible and wants to be placed. The district court thought it clear that the final judgment required ICF/DD placement within 90 days of the application: "There is no ambiguity in the final judgment. Any request from a developmentally disabled individual or his/her guardian for ICF/DD services, in whatever form, starts the 90-day time period in which the defendants are to evaluate the individual and provide or deny services."

Again, it is worth emphasizing this is a contempt proceeding, and the question properly before the district court was whether or not defendants had violated "a clear, definite and unambiguous" order, McGregor, 206 F.3d at 1383. Our reading of the final judgment in this case does not convince us that it clearly and unambiguously prescribes the time limit for determining eligibility. The final judgment provides only that defendants must establish a waiting list, "not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities." The final judgment does not address the question of when that 90 day waiting period is triggered, or how long the defendants have to determine who is eligible.

We need not choose between the competing interpretations of the final judgment. It is enough that there are two reasonable, competing interpretations, which is the very definition of ambiguity. Given the ambiguity in the final judgment, defendants' conduct in accordance with their reasonable interpretation of the judgment as permitting them to run the eligibility determination phase and the placement phase successively rather than concurrently cannot be contumacious. See NBA Properties' Inc. v. Gold, 895 F.2d 30, 32 (1st Cir. 1990) (any ambiguities in a judgment are to be construed in

favor of the alleged contemnor).[20]

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[20]We add that it is by no means clear that defendants' two-step application review process is inconsistent with federal law. There is nothing in this Court's prior opinion in this case, or in the Medicaid Act, or the federal regulations that directly addresses the question. Section 1396a(a)(8) provides that medical assistance shall be "furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). In our prior opinion, we upheld the district court's conclusion that section 1396a(a)(8) "creates a federal right to reasonably prompt assistance, that is, assistance provided without unreasonable delay." Chiles, 136 F.3d at 717. Further, we upheld the district court's conclusion that "reasonable promptness" meant a period not to exceed 90 days. See id. at 721-22. That is as far as our decision went. See id. at 722 (noting that "[t]he injunction is crafted only toward generating a 'reasonable waiting list time period' for eligible individuals.") (emphasis in original). We did not address the precise question of whether the time period for determining who is eligible for ICF/DD services runs concurrently with the 90 day waiting period in which those services must be furnished.

Section 435.911(a) of the Code of Federal Regulations provides that:

> The agency must establish time standards for determining eligibility and inform the applicant of what they are. These standards may not exceed –
>
> (1) Ninety days for applicants who apply for Medicaid on the basis of disability ...

42 C.F.R. § 435.911(a). Under defendants' reading of the

d. Improper Placements

The final ground on which the district court based its conclusion that the defendants were in contempt concerns certain ICF/DD placements that the court deemed improper because the facilities were not close to the beneficiaries' homes, or the beneficiaries were placed in co-ed facilities without first determining whether they possessed the ability to use appropriate sexual caution, or for both reasons. While these are concerns, they are not concerns that were addressed in the final judgment. Therefore, defendants cannot be held in contempt of the 1996 final judgment on the basis of the inappropriateness of any ICF/DD placements.

For all of these reasons, we conclude that the district court's order holding defendants in contempt must be reversed.[21]

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statutory and administrative scheme, they have 90 days to "determin[e] eligibility," 42 C.F.R. § 435.911(a), followed by 90 days to furnish assistance to those applicants determined to be "[Medicaid] eligible individuals," 42 U.S.C. § 1396a(a)(8). The only regulation that specifically addresses the time period for furnishing services, as opposed to determining eligibility therefor, provides only that the state agency must "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. § 435.930. Beyond these provisions, neither party has pointed us to any controlling authority that specifically addresses the question of whether the eligibility determination and the provision of Medicaid services to eligible individuals are to be performed successively or concurrently.

[21]Because we conclude that the finding of contempt cannot be sustained, we need not reach defendants' arguments regarding whether the particular sanctions entered against

3. Expansion of the Final Judgment

Defendants also challenge as overly broad the district court's reading of the injunctive relief provided in the final judgment. The district court stated that, pursuant to the final judgment entered in 1996, it is "now settled law ... that the defendants must provide a comprehensive, effectively working plan that provides adequate and appropriate services to eligible individuals within a reasonable time period." The court went on to hold that defendants were to be fined $10,000 per day "until a comprehensive plan, which comports with the letter and spirit of the judgment entered August 28, 1996, is submitted, ready for implementation."

Defendants contend that the district court's requirement of a "comprehensive plan" that provides "adequate and appropriate services" and that comports with the "spirit" of the final judgment, inappropriately expands the original scope of that judgment. They argue that the contempt order, read in its entirety, "can only mean that the state of Florida must completely restructure its Medicaid program for the developmentally disabled." They base this assertion on the various grounds, previously discussed, upon which the district court found them in contempt, including the court's conclusion that defendants sought inadequate funds to deal with the 23,000 individuals on waiting lists, the court's disapproval of the defendants' new standards for determining eligibility, its conclusion regarding the time limits for determining eligibility and providing services, and its objections to the manner in which defendants were offering and providing alternative services.

The district court perceived there to be a wide array of problems with the manner in which defendants were providing ICF/DD services and decided that all of those problems could be remedied with a contempt order. As we have already

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them constituted an abuse of discretion.

decided, however, the matters that troubled the district court had not been addressed in the final judgment, so they cannot serve as a valid basis for holding defendants in contempt. See Reynolds v. Roberts, 207 F.3d 1288, 1300 (11th Cir. 2000) ("Long standing precedent evinces a strong public policy against judicial rewriting of consent decrees.[22] A district court may not impose obligations on a party that are not unambiguously mandated by the decree itself.") (internal marks and citations omitted).

If the problems the district court perceived with the way in which defendants are providing Medicaid services – the lack of sufficient funding, the change in eligibility criteria, the time limit for determining eligibility, or the manner in which alternative services are provided – result from violations of state or federal law requiring judicial intervention, they can be addressed in another action.[23] Id. at 1301. Alternatively, under appropriate circumstances and after the proper procedures have been followed, the original injunction in this case might have been modified to address the problems. See Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 380, 112 S. Ct. 748, 758 (1992) ("[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the

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[22] Although Reynolds involved a consent decree, what it said is also applicable to non-consent decrees, because a consent decree is treated as "a judicial decree that is subject to the rules generally applicable to other judgments and decrees." Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 378, 112 S. Ct. 748, 757 (1992).

[23] In fact, there are currently multiple class action lawsuits before the district court that involve at least some of the issues raised in this case. See Prado-Steiman v. Bush, 221 F.3d 1266, 1282 n.17 (11th Cir. 2000) (noting that there are a total of five cases pending before Judge Ferguson pertaining to the provision of ICF/DD services).

circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.") (citation omitted); see also United States v. United Shoe Mach. Corp., 391 U.S. 244, 251-52, 88 S. Ct. 1496, 1501 (1968) ("If the decree has not ... achieved its principal objects ... the time has come to prescribe other, and if necessary more definitive, means to achieve the result.") (internal marks omitted); Mann Mfg., Inc. v. Hortex, Inc., 439 F.2d 403, 407 (5th Cir. 1971) ("It is well settled that the issuing court has continuing power to supervise and modify its injunctions in accordance with changed conditions."). Notice must be given, along with an opportunity to be heard, and, if aggrieved, either party may appeal.

Here, the principal object of the 1996 final judgment injunction, as interpreted previously by this Court, is to enforce plaintiffs' "federal right to reasonably prompt provision of assistance under section 1396a(a)(8)." Chiles, 136 F.3d at 719. The "assistance" at issue is the provision of ICF/DD services to eligible individuals. If ICF/DD services are not being provided in a reasonably prompt manner to eligible individuals, the five-year old injunction may be modified or a new one entered prescribing additional measures aimed at accomplishing this result, but only after proper procedures are followed. Compliance with the modified injunction or a new one can then be enforced, if necessary, through a contempt proceeding.

4. Governor Bush as a Party

We are persuaded by defendants' argument that because Governor Chiles had been dismissed from this lawsuit in 1992, there was no basis for "substituting" Governor Bush in the present case, and therefore there was no basis for holding the Governor in contempt. Accordingly, Governor Bush is hereby dismissed from the case and his name should be struck from the case style.

III. DISCUSSION: THE DELAYED CLASS CERTIFICATION ORDER

In their second appeal, defendants challenge the district court's February 11, 2000 order formally granting class certification, which was entered approximately three months after the defendants had filed their notice of appeal from the contempt order, and four years after the final judgment was entered. We have already recognized the existence of an implied class in this case and have directed the district court on remand to formally enter an order reflecting it, which takes most of the weight off this part of the consolidated appeal, but the defendants are entitled to have their appeal of the district court's February 11, 2000 order, which is still on the books, decided.

Defendants primarily contest the delayed certification order on jurisdictional grounds. They assert that their act of filing the notice of appeal from the district court's contempt order divested the district court of jurisdiction to take further action in the case. They are correct that, as a general rule, the filing of a notice of appeal divests the district court of jurisdiction over those aspects of the case that are the subject of the appeal. See Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982); Weaver v. Fla. Power & Light Co., 172 F.3d 771, 773 (11th Cir. 1999). However, it may not divest the district court of jurisdiction over collateral matters not affecting the questions presented on appeal. See Weaver, 172 F.3d at 773; cf. Resolution Trust Corp. v. Smith, 53 F.3d 72, 76 (5th Cir. 1995) (the district court maintains jurisdiction to order stays or modify injunctive relief).

The existence or non-existence of a class certification order was one of the issues on appeal from the contempt order. In their appeal of the contempt order, defendants argued that the district court exceeded its jurisdiction on remand by requiring class-wide relief in a case where no class had ever been certified.

Thus, the existence of a certified class is an "aspect of the case"

that is the subject of the appeal. See Griggs, 459 U.S. at 58, 103 S. Ct. at 402. Accordingly, defendants' filing of the notice of appeal divested the district court of jurisdiction to enter an order that directly impacted one of the questions proffered for review.[24] The February 11, 2000 order should be vacated.

IV CONCLUSION

We REVERSE the district court's October 7, 1999 contempt order, and its February 11, 2000 class certification order. We REMAND for further proceedings consistent with this opinion.

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[24]Our decision that the district court lacked jurisdiction to enter the class certification order renders moot the defendants' other arguments about that order.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-589-CIV-FERGUSON

JOHN/JANE DOES NO.'S 1-13, et al.,

Plaintiffs,

VS.

LAWTON CHILES, in his official capacity as Governor of the . State of Florida, et al.,

Defendants.
_____/

FINAL JUDGMENT

THIS CAUSE comes before the Court sua sponte. On July 22, 1996, this Court entered an Order granting Plaintiffs' cross-motion for summary judgment, concluding that the State of Florida is obligated to provide placement in intermediate care facilities for the developmentally disabled[1] ("ICF/DD's") with reasonable promptness. Accordingly, it is

ORDERED AND ADJUDGED that Defendants shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for

[1]Previously described as intermediate care facilities for the mentally retarded ("ICF/MRs").

placement in ICF/DD institutional care facilities. Jurisdiction is retained to enforce this Order.[2] Any pending motions are dismissed as moot.[3]

DONE AND ORDERED in Chambers at Miami, Florida, this day 28th of August, 1996.

WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

cc:
Counsel of record

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[2]No determination is made here as to the retroactive application of the new law.

[3]Currently pending, and rendered moot by this Order, is Plaintiffs' Emergency Motion for Preliminary Injunction. That motion raises issues which arise from legislation passed over four years following the filing of this suit. Further, the concerns expressed in that motion are adequately addressed in a post-legislation case pending before this Court, Cramer v. Chiles, Case no. 96-6619-CIV-Ferguson. Plaintiffs in this action, as a class, may intervene in the *Cramer* action.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN/JANE DOES NO.'S 1-1 3, et. al.,

Plaintiffs,

vs. Case No. 92-589-CIV-FERGUSON

JEB BUSH, in his official capacity as Governor of the State of Florida; KATHLEEN KEARNEY, in her official capacity as Secretary of the Department of Children and Family Services; GARY CRAYTON, in his official capacity as Director of Medicaid, AHCA; CARL LITTLEFIELD, in his official capacity as Assistant Secretary for Developmental Services; SARA HERALD, in her official capacity as DFCS District 11 Administrator.

Defendants.

ORDER ON MOTION FOR CONTEMPT

THIS CAUSE is before the Court on the Plaintiff's Motion for Contempt [D.E. 554] which seeks a determination that the defendants[1] are in willful non-compliance with a judgment of

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[1]The original defendant was Lawton Chiles, in his official capacity as Governor, and officers in the Department of Children and Family Services. Jeb Bush was substituted after he took office as Governor in 1999.

this Court ordering them to provide certain Medicare services to which the Plaintiffs are entitled.

History of the Case

In March, 1992, the Plaintiffs, thirteen developmentally disabled individuals, brought suit alleging that they were being denied rights to intensive care in intermediate care facilities, and that the denial violated statutory and constitutional rights. This Court agreed and entered a judgment on August 28, 1996, ordering the defendants to comply with federal regulations by providing the services in a reasonable time period. Specifically, the final judgment ordered that "[T]he Defendants shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities." That judgment was affirmed by the Court of Appeals in unequivocal language after an expedited hearing. The Eleventh Circuit mandate issued on April 17, 1998. No action of record was taken by the defendants in the following two months showing an intent to comply with the appellate court mandate.

In an effort to force compliance the Plaintiffs, on June 16, 1998, filed an Emergency Motion for Contempt. This was the first of several motions that sought enforcement of the August 1996 judgment. The defendants were granted a number of continuances to respond or to comply as the Court was led to believe that the defendants were attempting in good faith to locate and provide services to the plaintiffs. Because no steps were taken toward compliance the case came before the Court again on November 4, 1998, on the Motion To Show Cause why the defendants should not be held in contempt. At the conclusion of the hearing an Order was entered, dated November 10, 1998, finding

> by uncontroverted facts and, particularly, by admissions and sworn, statements of the Defendants themselves, that the State Defendants have failed to comply with the

Final Judgment of this Court and the mandate of the Court of Appeals. Individuals eligible for services provided under Medicaid's program, Intermediate Care Facilities for the Developmentally Disabled ("ICF/DD") are still awaiting services. In fact the number of bed spaces for ICF/DD eligible persons were reduced in recent months without provisions for adequate alternative services.

Persuading the court again that the agency needed additional time to revamp its policies, which required approvals from federal agencies and adequate appropriations, no sanctions were imposed. Instead the Court entered an order which granted additional time to complete specific acts of compliance:

a) Within 30 days from the date of this order the defendants shall resolve this matter as to the named members of the class by providing Medicaid service in accordance with federal statutes.

b) Within 60 days the defendants are to submit a plan which identifies, locates and provides for the immediate delivery of services to the 600 persons the state has recognized as eligible for, but not receiving services for the developmentally disabled.

c) By February 12, 1999, defendants shall fully comply with the Final Judgment as to all members of the numbered class.

Finally, by the Order of November 10, 1998, the case was set for a first compliance review on February 19, 1999, at 9:00 a.m.

What followed for the next six months was a clear pattern of delay causing a continued denial of services to many developmentally disabled persons in disregard of the judgment. The defendants again sought a number of continuances that were granted as they convinced the Court that they were seeking and expected to succeed in obtaining adequate appropriations to serve those developmentally disabled individuals eligible for services. A hearing to determine compliance was also continued another time in the belief that the defendants had secured an agreement with the plaintiffs for

a speedy resolution using alternative methods such as arbitration.

However, the defendants did not fully comply with the November 10, 1998, Order within the time periods allotted, nor at any point since. What followed instead were orchestrated challenges to the Court's authority in pleadings, arguments, and public announcements. The defendants still have not complied with the more than one year old Eleventh Circuit mandate nor the nearly four-year old Order of this Court.

Since the commencement of this action seven years ago, the defendants have requested over fifty continuances, most of which the Court has granted in accepting the defendants' entreaties that obtaining adequate funding from the legislative branch of government was a glacial-like process. Notwithstanding the Court's leniency and grant of additional time, or probably because of it, the defendants have pursued a policy of circumvention even after the political and economic currents became favorable for compliance. When this Cause came for hearing it was immediately apparent that the defendants were not genuinely attempting to resolve this matter as ordered. In fact, the compliance plan, due January 10, 1999, was tardy. Moreover, the plan, discussed in the following sections, falls far short of performance in accordance with this Court's Order as affirmed by the Court of Appeals.

State's Compliance Plan

In the January 11, 1999, Notice of Filing the defendants stated "[tlhe Plan of Compliance contains a succinct affirmation of the defendant's intention to fully comply with the Final Judgment in this matter." Thus, by their own statement the defendants have acknowledged that what they presented, ten months after issuance of the appellate court mandate, is only an intent to comply. Indeed, the compliance plan submitted by the defendants is primarily about their plans for the future and points to no significant acts of completion.

A synopsis of what is at best a plan to come later includes

as components a description of Screening, Evaluation, Interview, Implementation of Services, and Future Changes for Service Delivery. The defendants summarily outline how many individuals they estimate are eligible for ICF/DD services, which is different from the numbers previously identified, and go on to argue what services they believed the law requires them to provide. For the first time they advise the Court of a newly-adopted Florida Status Tracking Survey ("FSTS") and claim-that "[a]ll persons currently served by Developmental Services will be evaluated using the [new system] by July 1, 1999." In the "plan" the defendants note that they have provided or intend to provide the services they are lawfully obligated to deliver.

At the May 24, 1999, Compliance Hearing, consistent with their deficient written plan, the defendants still could not show compliance with this Court's orders, but rather claimed they were in the "process of complying." However, as disclosed by the evidence, between January 11, 1999, and May 24, 1999, few efforts were undertaken to actually comply according to the order. Instead the more significant undertakings were geared to changing the rules and implementing new service plans, including the FSTS, to justify compliance on their own low-budget terms.

Compliance Hearing

The Compliance Hearing was held May 24,1999, through May 26, 1999. The defendants used all of the three-day time period allotted for the hearing.

The hearing began with brief opening statements from both the defendants and the plaintiffs followed by the presentation of the defendants' witnesses including Colonel Robert Cohen, Ray Foster, Gary Crayton, Susan Dickerson, Dr. Amelia Cardonne, and Dr. Fotena Zirps, all top administrators or experts in the Department.

1. Inadequate Funds Were Sought to Comply with the Court's

Several significant admissions were made by the State's administrators during cross-examination including that the $100 million in new funds were inadequate to comply with the final judgment which was approved by the Court of Appeals. The uncontroverted evidence as presented to the Court shows that the Department received all the appropriations requested from the Legislature. However, as the administrators admitted, the defendants requested enough funding only to reduce the waiting list by 53%. Twenty-three thousand individuals are currently on waiting lists for over the 90-day time period and the defendants need, by their own estimate, an additional $118 million dollars to reduce the list.[2] Because the amount requested of the legislature was approximately 47% less than needed, it may be inferred that there was never an intent to timely comply with the mandate of the Eleventh Circuit or this Court's Order. An internal memorandum dated April 26, 1999, makes it clear that staying within budget was given priority over the delivery of services--evidence that non-compliance with the Eleventh Circuit's mandate or this Court's Order was willful.

2. Changing Criteria Was Unlawful Rulemaking

More evidence that the defendants' plan lacked sincerity surfaced one week after this Court's November 10, 1998, Order when the defendants changed their eligibility standards for

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[2]Only 634 eligible individuals are plaintiffs in this lawsuit as an order certifying a class was never entered. See Does No.'s 1-13 v. Chiles No. 92 Civ. 589 n.3 (S.D. Fla. Aug. 28, 1996). The remaining thousands of eligible persons are plaintiffs in another class action suit also pending; Cramer v. Bush, No. 96 Civ. 6619 (S.D. Fla. June 6, 1999).

ICF/DD services so that a large number of persons then receiving ICF services would no longer be eligible. This change was made without following formal rulemaking procedures and without publishing the changes so that the public could understand how eligible persons would be affected. In fact no public notice was given even after the changes had been made.

The manner in which the defendants implemented the new criteria and standards to decide an individual's eligibility for services constituted unlawful rule-making. It is well established in the law that with newly adopted rules which adversely affect services, those persons impacted must be given notice and an opportunity to be heard. See Cleveland Clinic Florida Hospital v. AHCA, 679 So. 2d 1237 (Fla. 1ST DCA 1996). The defendants do not deny that the new criteria substantially reduces services to a large number of previously eligible disabled individuals without notice. A question of fundamental fairness is presented. See Committee for Fairness v. Kemp, 791 F. Supp. 888, 895 (D.D.C. 1992) (holding that "agency actions which establish new methods for determining the obligations of regulated parties and the distribution of funds is subject to notice and comment rulemaking."). Rules that effect a change in existing law or policy, or grant rights, impose obligations, or produce other significant effects on private interests are legislative rulemaking which requires notice and an opportunity to be heard. Associated Builders and Contractors, Inc. v. Reich, 922 F. Supp 676, 680-81 (D.D.C. 1996).

It is admitted by the defendants that based on the level of needs as established by the FSTS a large number of persons now receiving ICF services will no longer be eligible. After all that has been said and written in several cases involving the developmentally disabled over the past three
years it is surprising to hear a state administrator say, as was said here, that he or she does not know whether an applicant whose request for ICF services has been turned down because of a change in eligibility criteria was entitled to notice of the

rule change. Such notice is statutorily mandated. Cramer v. Chiles, 33 F. Supp.2d 1342, 1352 (S.D. Fla. 1999). See also Catanzano v. Dowling, et. al., 847 F. Supp. 1070, 1085 (W.D. N.Y. 1994); Parry v. Crawford, 990 F. Supp. 1250, 1258 (D. Nev. 1998); 42 U.S.C. § 1396 (a) (3); 42 C.F.R. §§ 431.206, 431-210,431.220, 435.912,435.919 (a).

3. Validity of the FSTS

According to the defendants, the Florida Status Tracking Survey is useful in gauging eligibility for ICF/DD services. It is employed as a pre-screening tool that separates individuals into five different Levels of Need ("LON"). LON Four and Five are assured services; LON One and Two receive no services; and LON Three received no services when the system was implemented in January, 1999. At the Hearing, the defendants announced that they changed the rules again after April 20, 1999, to reinstate services to persons at LON Three. It cannot be verified however that all persons who fall under LON Three have been notified about the rules change or offered a choice because the defendants cannot provide, by what they describe as the best evidence, signed choice forms from all affected individuals or their guardians.

The defendants' adoption of the FSTS as a "pre-screening tool" is contrary to federal and state law which requires that the initial certification of need for in-patient care be made by a physician and that the evaluation for admission to an ICF/DD or payment for the service be conducted by an interdisciplinary team. See 42 C.F.R. § 483.440 (1999); Fla. Stat. §§ 393.11, 394.4625 (1999). The consequence and obvious intent of adopting the experimental FSTS tool for assessing need has been to remove a large number of individuals from the list of those eligible for and receiving ICF/DD services. Circumvention of the final judgment entered in 1996, which ordered that services be provided to identified eligible individuals, is thus effectively accomplished.

It is admitted by the defendants that the FSTS is not an

interdisciplinary assessment; that it is still a "work in progress" which will not be validated for at least five months; and that it has never been used anywhere in the nation as it has been utilized in this case. The FSTS is not a complete or ready tool and even if the State seeks accreditation, the defendants admit, they cannot obtain approval for at least two years. At this time the defendants' own expert witness cannot give an opinion on whether the FSTS was formulated correctly, accurately measures anything, or is a valid instrument. On cross-examination, the expert testified as follows:

> Q. You are not offering any opinion as to whether the Florida Status Tracking Survey is a legitimate measure or whether somebody is eligible for an ICF placement, are you?
> A. No, I am not.
> Q. You are not offering any opinion as to whether the Florida Status Tracking Survey accurately measures anything that is relevant to the need for an ICF-DD placement, are you?
> A. No, I am not.
> Q. You are not offering any opinion as to whether the actual methodology used by Mr. Foster complies with your ideas of other requirements for adequate development of a test. Is that correct?
> A. Please ask me that question again.
> Q. You are not testifying that Mr. Foster complied with the criteria you believe were necessary for the development of a test, are you?
> A. I do not have a personal knowledge of that.
> Q. Has the State of Florida or the Department applied to any [of] these agencies for accreditation at this point?
> A. We have not applied at this time.
> Q. You don't know if the test is any good to measure whether somebody should be offered an ICF-DD placement, do you?
> A. I don't know if it's a valid measure.
> Q. You don't know if it's a valid measure?

A. That's correct.

Nothing offered by the defendants showed the survey to be a valid instrument for measuring the needs of developmentally disabled individuals.

4. Use of the FSTS as a "Pre-Screening Tool"

The FSTS does not address many of the important factors considered by Medicaid when determining an individual's need for continuous active treatment. Neither does the FSTS factor in the individual's ability to understand or partake in expressive communication, to move about in either familiar or unfamiliar environments, to use appropriate sexual caution, or to exercise safety awareness. The defendants admit that the FSTS does not consider all the factors listed in the Medicaid Code as bases for continuous active treatment. They contend that it is unlikely, while conceding to the possibility that an individual who qualifies for services under the Medicaid provisions could be excluded by the FSTS because the built-in criteria is faulty.

Under both federal and state law, active and continuous treatment is required where regression might result. Hence, services should be provided to individuals, on any scale devised by the defendants, who would regress without them. Currently, the defendants are not reviewing the individuals who have been dropped from the eligibility list to determine whether they are at risk of regression and deterioration. Refusal to provide services and monitor the individual until she regresses to the point of need is contrary to the intent of the Medicaid provisions which seek to affirmatively improve the quality of life. Categorization of the developmentally disabled into five different levels on factors which exclude medicaid criteria and providing services to only those in the two highest categories violates the statute and the Order of the Court.

5. Review of Adverse Decisions Based on the FSTS

As observed above, use of the FSTS as a screening

mechanism is substantively faulty because it relies on incomplete medical records, excludes the assessments made by the individual's health care provider, and fails to provide for an independent review of an adverse determination. Further, the tool is inadequate because there is no evaluation or decision made by an interdisciplinary team as required by law. Instead the final eligibility determination is made by a single reviewing physician who is employed by the defendants. This single physician, who does not see the patients, is authorized to overrule eligibility determinations made by all treating physicians.

There are no safeguards against arbitrariness in canceling services to persons now receiving or who were eligible for ICF/DD services. The claimed protection against unfair cancellation of services, according to the defendants, is an examination of records by the agency's in-house physician. First, as previously noted, the review is not independent. Second, the records are admittedly incomplete for an adequate review. Among the few case files that were reviewed the physician did not have or did not consider reports regarding the individual's developmental needs, aside from medical needs, to determine whether the individuals found at Levels I or II by the FSTS assessment are otherwise in need of continuous active treatment. It was conceded by the in-house medical physician who reviews the records, that she has no expertise in the conditions that affect developmentally disabled individuals.

No assessments were made under the new criteria until April 1999, two months after the defendants should have fully complied with the order of November 1998. The in-house physician had time to review only 34 files since she was hired for the position on or about May 13, 1999. Assuming that the FSTS could be constructed to serve as a valid instrument it is clear that much is left to be done.

6. Phantom Choices Provided to Developmentally Disabled Individuals

Eligible individuals offered community based services as an alternative to an intermediate care facility are not informed that, because of inadequate funding, acceptance of the offer does not insure placement in the immediate future. As found in Cramer, such a choice is really no choice at all. The offer is misleading and serves the obvious purpose of allowing the agency to postpone the delivery of services.

7. Ninety-Day Time Period

According to the defendant's "Central Admission Policy for Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD) in Compliance, with Doe v. Bush, [96 Civ. 6619 (S.D. Fla. June 6, 1999)]" an initial letter of request is not considered a request, but a letter of inquiry. The effect of the unreasonable interpretation, again, is to postpone service delivery. The "inquiry" triggers a 90-day investigation to determine eligibility. After the applicant has been determined eligible the defendants say they have another 90 days to make an ICF placement. The result is 180 days from the date of request to placement instead of 90 days. There is no ambiguity in the final judgment. Any request from a developmentally disabled individual or his/her guardian for ICF/DD services, in whatever form, starts the 90-day time period in which the defendants are to evaluate the individual and provide or deny services. It has already been determined that a three month period is sufficient time for defendants to complete the process from evaluation to the commencement of services.

8. Improper ICF/DD Placements

It also appears from the evidence that the defendants may no longer be considering geographical proximity of the facility to the beneficiary in their placement decisions. The plaintiffs contend that the defendants are purposefully offering placements to developmentally disabled individuals in areas of the state far away from their support systems of family and

friends so that they can claim they made a placement offer knowing that the offer will not be accepted because of the hardship a remote placement will cause. A high ranking official in the defendant Department of Children and Families has admitted that such placements are occurring and that they are "therapeutically inappropriate."

It is also contended that the defendants are assigning individuals to ICF/DDs where both genders cohabit without any screening by the defendants to ensure that the placement is appropriate. Placing developmentally disabled individuals in sexually integrated ICF/DDs without evaluating the individual's ability to use appropriate sexual caution or to exercise judgment for personal safety or to engage in expressive communication, does not satisfy the court imposed obligation for appropriate placement.

State's Ability to Design Plan

This Court agrees with the proposition advanced by the defendants that the state has the right and duty to tailor its services to meet individual needs and that the right may be a qualification on the plaintiffs' right to choose. The Court also agrees that the state may choose any vehicle it wishes to provide the necessary services. However, the now settled law is that the defendants must provide a comprehensive, effectively working plan that provides adequate and appropriate services to eligible individuals within a reasonable time period. The state agency's desire to remain within self-imposed budgetary constraints is not a factor the court will consider in deciding whether the services provided are timely or adequate.[3]

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[3]An argument made by the defendants, which is supported by evidence presented in this and other cases, is that the sudden increase in requests for institutional care came on the heels of a campaign by agents of the for-profit private care facilities, to find individuals, who might qualify for ICF/DD services.

See Olmstead v. Zimring, 119 S. Ct. 2176 (1999) (The State's endeavor to keep its own institutions fully populated, as an alternative to costly community placement, is subordinated in appropriate cases to treatment in the most integrated setting). The modifications the state seeks to insert into a compliance plan are unlawful.

Conclusion

The compliance plan which has been presented to the Court is one which would circumvent the judgment by (1) a tortuous interpretation of the decree; (2) denying or delaying placement of eligible individuals in ICF/DD facilities by an unlawful change in eligibility criteria; (3) misleading eligible individuals with offers of community based services as an alternative to an intermediate care facility when there are presently insufficient funds to provide these services, and; (4) offering ICF placements at facilities far removed from home support bases or which are otherwise inappropriate.[4]

While the Court has recognized the good intentions of the Department's new administrators to properly care for the developmentally disabled, they are hobbled by the same

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Many of the requests for ICF/DD placements may be based on misinformation, or made by or in behalf of persons not in need of intensive care. On a showing of hardship the ninety-day period for compliance may be extended to allow for more thorough screening. Keeping privately owned institutions fully populated, at state expense, has been a conflicting interest driving this and companion cases. In several other cases the institutions were named plaintiffs.

[4]Post-hearing piecemeal submissions by the defendants have not been considered in this determination.

planned short-changing[5] in appropriations which frustrated their predecessors. Respect for the law requires that this three-year old judgment against the defendants be finally enforced. Many of these plaintiffs have been desperately awaiting services for over seven years. As found earlier in this lawsuit, no other class of medicare-eligible beneficiaries are on waiting lists for services. Accordingly, it is

ORDERED AND ADJUDGED that the defendants are in contempt for willful non-compliance with a judgment of this Court to provide Medicare services to which the plaintiffs are lawfully entitled. The defendants are fined $ 10,000 a day, which shall begin 10 days after the date of this Order, to continue until a comprehensive plan, which comports with the letter and spirit of the judgment entered August 28, 1996, is submitted, ready for implementation.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 7th day of October, 1999.

WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Steven M. Weinger, Esq.
Chesterfield Smith, Jr., Esq.

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[5]It is contended by the plaintiffs, and not disputed by the defendants, that Florida ranks 49th in the nation in terms of resources devoted to individuals with developmental disabilities.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN/JANE DOES NO'S 1-13, et al.,

Plaintiffs,

vs. CASE NO. 92-589-CIV-FERGUSON

JEB BUSH, et al.

Defendants.
_____/

ORDER GRANTING CLASS CERTIFICATION

THIS CAUSE is before the Court on the Report and Recommendation of the Magistrate Judge that. the Plaintiffs' Motion for Class Certification be Granted [D.E. 446]. Having duly considered the motion, the report and recommendation, and pertinent portions of the record, it is

ORDERED AND ADJUDGED that the Report and Recommendation is **ADOPTED** with a modification so as to more precisely describe the class:

> Medicaid eligible individuals with developmental disabilities who have formally requested placement in an Intermediate Care Facility (ICF/DD) and for whom the placement would be medically and otherwise appropriate but who have not received a placement with reasonable promptness. Specifically included in this class are the approximately 600 individuals the State of Florida has identified as eligible for ICF/DD placement who have been awaiting placement for more than 90

days.[1]

DONE AND ORDERED this 11th day of February, 2000.

WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Steven M Weinger, Esq.
Chesterfield Smith, Jr., Esq.
Paul F. Hancock, DAG

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[1]In a pending appeal the defendants have challenged the breadth of an order on grounds that it compels relief for a class of-individuals beyond the named plaintiffs. This Order on class certification is germane to that issue and should be added to the record on appeal as a supplement.

APPENDIX E

Cases Filed in Comparison to Class Action Cases Filed
for the 12-month period Ending December 31, 1996-2000

Year	Civil Cases	Class Action Cases	% Total
1996	263,366	1,223	.46
1997	273,212	1,709	.62
1998	252,994	2,215	.87
1999	261,651	2,058	.78
2000	257,832	2,419	.93

Source: Tables C and X-5
Administrative Office of the United States Courts
Statistics Division